115-362

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~919~~. 564

EDWARD DEFFEBACH, APPELLANT,

vs.

ROBERT HAWKE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED SEPTEMBER 5, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 913.

EDWARD DEFFEBACH, APPELLANT,

vs.

ROBERT HAWKE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

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1 TERRITORY OF DAKOTA, } ss:
First Judicial District, }

In the District Court in and for Lawrence County.

ROBERT HAWKE, Pl'ff, *vs.* EDWARD DEFFEBACK, Def.

The Territory of Dakota sends greeting to Edward Deffeback, defendant:

You are hereby summoned and required to answer the complaint of the above-named plaintiff, a copy of which is herewith served upon you, and to serve a copy of your answer upon the subscriber, at his office in Deadwood, within thirty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer this complaint within that time the plaintiff will apply to the court for the relief demanded in the complaint.

Dated at Deadwood, D. T., this 20th day of June, A. D. 1882.

A. J. PLOWMAN,
Plaintiff's Attorney.

2 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

I hereby certify and return that I received the within summons & ans. and complaint June 20th, 1882, and that on the same day I served the same by delivering and leaving at the residence of the within-named defendant, Edward Deffeback, at Deadwood, in said county, in the presence of Nancy Deffenback, a member of his family, over the age of 14 years, true copies of the same.

JOHN P. BELDING, *Sheriff,*
By WM. BREWER, *Deputy.*

Sheriff's fees, $1.80

Filed July 21st, 1882. FRANK J. WASZABAUGH, *Clerk,*
By C. C. MOODEY, *Deputy.*

3 *Complaint.*

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

In District Court, First Judicial District.

ROBERT HAWKE, Plaintiff, *vs.* EDWARD DEFFENBACK, Defendant.

The above-named plaintiff complains of the said defendant and alleges:

First. That on the 20th day of November, 1877, the plaintiff, being in the actual, peaceable, and exclusive possession of the lands hereinafter mentioned, duly filed his application in the United States land office at Deadwood, in the county of Lawrence and in the Territory of Dakota, to enter said lands as a placer mining claim under the laws of the United States, and that on the 31st day of
4 January, 1878, plaintiff duly entered said lands as a placer mining claim, and paid the Government price therefor, and that on the 31st day of January, 1882, a patent conveying the fee-

simple title to said lands was executed and delivered to plaintiff by the United States, whereby plaintiff became the owner of said lands, and described as mineral entry No. 8, designated by the surveyor general as mineral lot No. 53.

That while plaintiff was such owner in fee and so in the actual and peaceable possession of said lands and premises, the defendant Edward Deffenback, on or about the first day of July, 1878, with full notice of plaintiff's title, and after having been served with a written notice forbidding him to enter upon said premises, or make any improvements thereon, did, unlawfully and wrongfully, without right or title, enter into and upon a portion of said premises, to wit, a piece of land in Lawrence county, Dakota Territory, in Deadwood, twenty-five feet in width, fronting on easterly side of what is commonly called Sherman street, and running back therefrom one hundred feet in depth of the same in width, said land being a part of mineral lot No. 53, as shown by the record of the U. S. patent recorded in the register of deeds office for said Lawrence county, D. T., and oust and eject the plaintiff therefrom, and ever since that day has withheld and still withholds the possession thereof from the plaintiff, to the damage in the sum of $500.

5 Third. That the value of the use, rents, and profits of said land and premises from the said 1st day of July, 1878, and while the plaintiff has been excluded therefrom, is $800.

Wherefore plaintiff demands judgment against said defendant:

First. For the recovery of the possession of the land and premises herein described as withheld by defendant.

Second. For the sum of $500 damages for the withholding thereof.

Third. For $800, the value of the use, rents, and profits thereof, and the costs of this suit.

A. J. PLOWMAN,
Plaintiff's Attorney.

The answer of defendant is as follows:

In District Court of the First Judicial District of Dakota Territory within and for the County of Lawrence.

ROBERT HAWKE, Plaintiff, *vs.* EDWARD DEFFEBACK, Defendant.

6 The defendant, answering the plaintiff, complain- herein:

First. Denies each and every allegation in said complaint contained, except as hereinafter stated.

Second. Admits that on the 20th day of November, 1877, the plaintiff filed his application in the U. S. Land Office for a patent as a placer mining claim to the land described in the complaint as mineral lot No. 53, and admits that the land described in the complaint as detained by the defendant is within the boundaries of said lot No. 53, but denies that the plaintiff was in the actual, peaceable, or exclusive possession, or in any possession thereof, at the time of filing his said application, or at any other time, and also admits that on the 31st day of January, 1878, the plaintiff paid to the receiver of said land

office $2.50 per acre for the land contained in said lot, and received from said register and receiver a certificate or receipt therefor, which payment and receipt is commonly called on entry.

Third. And for a further defense and counter-claim and affirmative relief defendant alleges: That on the 28th day of February, 1877, being the date of the ratification of the treaty with the Sioux Indians, by which the lands in said Lawrence county were
7 first opened to settlement and occupation, the said land included within the boundaries of said lot 53, together with a large amount of other lands in the immediate vicinity thereof and adjacent thereto, was lawfully appropriated, selected, set apart, used, and occupied for town site purposes, and as such, surveyed and laid out into lots, blocks, streets, and alleys, for municipal business and trade, and all the various business carried on in a town or city, and was then and ever since known as and called the town of Deadwood, at which time said town contained a population of at least 2,000 inhabitants, and upon which lots and blocks there was situate a large number, to wit, about 500 buildings, which buildings and the lots upon which the same were situated were then, and ever since have been, and now are, used and occupied exclusively by the said inhabitants and occupants of said town site for the purpose of dwellings, residences, and municipal business and trade, and not for agriculture, and which town was, on the said 28th day of February, and ever*y* since has been, and now is, the great centre of business and trade west of the Missouri river, in the Territory of Dakota, and at the time of the commencement of this action contained a population of about three thousand five hundred inhabitants, and that on said 28th day of February the buildings and improvements, permanent in character upon said lots and blocks within
8 said town site, belonging to said town occupants were of the value of about two hundred thousand dollars ($200,000), and that the buildings and improvements, permanent in character thereon now owned by said town occupants are of the value of about one million of dollars.

That the land described in the complaint as detained by defendant was, on said 28th day of February, ever since has been, and now is, within the limits of said Deadwood town site, and was one of the lots therein so originally located, laid out, used, and occupied for town site purposes, as hereinbefore stated, and that the same, during all that time, has been, by the defendant and his grantors, occupied as a town lot for the purposes of business and trade in said city, and not for agriculture, with the buildings and improvements thereon belonging to defendant and his grantors.

That the said placer mining claim for which the plaintiff filed application for patent October 24, 1877, as alleged in plaintiff's complaint, was not located or claimed by the plaintiff, or any other person, until long after the selection, settlement upon, and appropriation of the said lands for town site purposes, as aforesaid, and
9 that at the time of the said location of said pretended placer mining claim the said land described in the complaint as detained by the defendant was, and for a long time prior thereto

had been, in the quiet, peaceable, and exclusive possession of and occupied by the grantor of the defendant as a town lot in said city for the purpose of business and trade, and that the same has at all times since been so occupied and used and possessed by the defendant and his said grantor.

That on the 29th day of July, 1878, the said town of Deadwood, being then unincorporated, the probate judge of Lawrence county, as by law required, entered at said land office the said town site of Deadwood, paid the Government price therefor, and received from its officer a receipt for said money and a certificate showing said entry and purchase by said probate judge of said town site, in trust for the use and benefit of the occupants thereof, including the defendant.

That said town site entry embraced the said land contained in the plaintiff's said application for a patent.

10 That thereafter, and on the 10th day of April, 1879, the Commissioner of the General Land Office, at Washington, D. C., ordered a hearing before the said land office at Deadwood, between the plaintiff, the said probate judge, trustee as aforesaid, as to the character of said land for mineral purposes; at which hearing the said Commissioner refused to permit either party to be heard on any other question of fact, for the reason that said Commissioner decided, as a proposition or question of law, decisive of and control-ing the case and the rights of the said parties, that the only question of fact that could be heard or determined in said case was the mineral or non-mineral character of the land, and decided that the fact of the prior occupation and appropriation of said land for town site purposes, as aforesaid, did not confer any rights whatever upon the occupants of said town, including the defendant or those through whom he claims.

That the defendant and other occupants of town lots in said city of Deadwood, who were beneficiaries created by the trust resulting from the entry of the said land so made by said probate judge, were the prior appropriators of the land embraced within said

11 town site entry, and upon said hearing claimed the right to submit evidence establishing their said priority of appropriation, and that the same was so proven before said land office at such hearing, and was not disputed, but that the register and receiver of said office refused to consider said testimony proving such priority, and decided the controversy between the parties solely upon the ground of the mineral character of the land as before stated.

That upon appeal to the Commissioner of the General Land Office from said decision the same was affirmed by him on the 4th day of February, 1880, from which decision the said beneficiaries appealed, under the law, to the Secretary of the Interior, at Washington, who also affirmed the said ruling of the Commissioner, and decided against the said beneficiaries, and awarded the said land, together with all the improvements of this defendant, to the said plaintiff.

That upon such review by the said Commissioner and Secretary, there was no dispute as to the fact that said town site claimants

were the first appropriators of the land, and that the defend-
12 ant, and those through whom he claims as inhabitants and occupants of said town, acquired an interest in and occupied and used said lot in controversy herein for the purpose hereinbefore stated, and that they were beneficiaries under the trust so created as aforesaid, and were appropriators prior to any appropriation whatever on the part of the plaintiff; but, notwithstanding these undisputed facts, the said Commissioner and Secretary decided that the fact of the prior appropriation of this land, and its selection, settlement, occupation, and use, as hereinbefore stated, as and for municipal purposes and for trade and business as a town site and not for agriculture, gave no rights to the inhabitants and occupants of the same, nor to the defendant or those through whom he claims by reason thereof, basing their said decision upon the sole ground that the land was valuable for mineral, and that therefore there was not and could not be any occupation, settlement, or appropriation thereof, for the purpose of the town site, nor any recognition of or protection given to the rights or claims of the said inhabitants or occupants, or to the defendant, in or to the said land or the improvements thereon, but that the same, together with all the improvements thereon, including those of the
13 defendant, were the property of the plaintiff, and thereupon the said Commissioner and Secretary illegally awarded the said lands to the plaintiff, and refused to patent the same, or any interest therein, to the said probate judge or to defendant, directly or indirectly, but wrongfully and illegally thereafter cancelled the said entry of the probate judge, and directed and caused a patent therefor to issue to plaintiff in fee, which is the patent mentioned in plaintiff's complaint, and upon which he bases his action.

Whereas the said patent to plaintiff should have contained an exception or reservation excepting and excluding from its operation all town property, rights, and all houses, buildings, structures, lots, blocks, streets, alleys, and other improvements on the said land not belonging to the plaintiff, and all rights necessary or proper to the occupation, possession, and enjoyment of the same, as provided by law, and in accordance with the then settled and long-established rule of the Department of the Interior.

That the said decisions of the said Commissioner and Secretary awarding said land to the plaintiff and refusing to recognize
14 or protect the prior rights of defendant and the other occupants of said town, were and are contrary to law, and was an erroneous construction thereof with reference to the rights of the said town site occupants, including the defendant, upon the said undisputed parts as to the said priority of appropriation for town site purposes aforesaid, and that by reason thereof and the said conveyance to plaintiff in fee in pursuance thereof, the plaintiff has acquired and now holds the said land in controversy, and the buildings and improvements thereon, in trust for the defendant, and all rights necessary or proper to the occupation, possession, and enjoyment of the same, all of which rights, &c., should be conveyed by plaintiff to defendant.

That the defendant has always been, and now is, ready and willing, and hereby offers, to pay the plaintiff his just proportion of the legal expenses in procuring the said patent.

Fourth. For a further and second defense and counter-claim defendant alleges that on the 28th day of February, 1877, the premises in controversy were lawfully appropriated for town site
15 purposes, as stated in the preceding and first defense contained in this answer; that the allegations of said defense in relation to the town site of Deadwood City from its first location to and including the award of said patent to plaintiff are referred to now and made a part of this counter-claim, with the same effect as though such allegations were fully stated in this defense.

That on said 28th day of February one Henry B. Beaman, being one of the inhabitants of said town site, was in the peaceable and lawful occupancy and possession, claiming to be the owner thereof, of the premises in controversy in this action, as described in the said first defense herein; at which time said Henry B. Beaman had a building and other improvements thereon, and that during all the time thereafter, up to, and until, and at the time of, the date and conveyance of said premises to defendant, as hereinafter stated, the said Henry B. Beaman remained in the continuous occupation and possession of said premises, occupying and using the same as a town lot for the purpose of business and trade, claiming title thereto, in good faith, against all persons except the United States, and claiming the right to acquire the title of the United States
16 thereto as a town lot.

That thereafter, to wit, on the 6th day of July, 1878, and while the said Beaman was so, as aforesaid, in the lawful, quiet, and peaceable possession and occupation of said premises, claiming title thereto, he did, for a valuable consideration, sell, and by a good and sufficient deed convey, the said premises to the defendant, who in good faith purchased the same and received the said deed and the possession of said premises from said grantor; and has at all times and until the commencement of this action occupied and possessed said premises under said deed, claiming title thereto, in good faith, adversely to the plaintiff, and before the plaintiff acquired any title thereto, defendant in good faith made permanent improvements upon said premises, which improvements and the value thereof are more particularly set forth as follows: One two-story frame building and a cellar and other improvements of the value of $1,300.

That the value of said land, aside from the said improvements thereon, will not exceed the sum of one hundred dollars.

17 Wherefore defendant prays:

First. That the plaintiff take nothing by this suit.

Second. The plaintiff be decreed to convey to the defendant said premises in controversy, excepting and reserving to the plaintiff in such conveyance the right to mine and extract the precious metals from said premises, provided that in so doing the plaintiff shall not materially injure, endanger, or interfere with the buildings and improvements thereon and the necessary use and enjoyment of the premises by the defendant.

Third. That in the event that it should be determined that the plaintiff is the owner of and entitled to the possession of said premises, then that the value of the improvements thereon, and also that the separate value of the improvements be specifically found, and that the defendant have judgment for the value of his said improvements.

18 Fourth. For such other and further relief as may be just, with costs.

ALBERT ALLEN,
Defendant's Attorney.

The demurrer of plaintiff to defendant's answer is as follows:

19 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

In District Court, First Judicial District.

ROBERT HAWKE, Plaintiff, *vs.* EDWARD DEFFEBACK, Defendant.

The plaintiff demurs to the first defense and counter-claim of defendant's answer upon the ground that the same does not state facts sufficient to constitute a defense to this action or a counter-claim in defendant's favor against plaintiff.

Plaintiff also demurs to the second defense and counter-claim of defendant's answer upon the ground that the same does not state facts sufficient to constitute a defense to this action or a counter-claim in defendant's favor against plaintiff.

A. J. PLOWMAN,
Plaintiff's Attorney.

That on the 25th day of September, 1883, the said action coming to be heard in open court upon the issues of law joined by said complaint, answer, and demurrer, and the court having fully
20 heard and considered the same, it was by the court ordered that said demurrer to said answer, and to each of the separate defenses and counter-claims therein, be, and the same were by the court, sustained; to which order of the court the defendant duly excepted; which order of the court and the exceptions of the defendant thereto are as follows:

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

In District Court, First Judicial District.

ROBERT HAWKE, Plaintiff, *vs.* EDWARD DEFFEBACK, Defendant.

On reading and filing the demurrers of plaintiff to the first and second defences and counter-claims in defendant's answer contained, after hearing A. J. Plowman, counsel for plaintiff, in support thereof, and Messrs. Albert Allen and W. C. Kingsley in opposition
21 thereto, it is ordered that the said demurrers and each of them be, and the same are hereby, sustained as to each de-

fense and counter-claim, respectively, with leave to the defendant to serve an amended answer within thirty days.

Done in open court, this 25th day of September, 1883.

By the court: WILLIAM E. CHURCH, *Judge.*

To which order and ruling of the court sustaining plaintiff's demurrer to the first defense and counter-claim in defendant's answer the defendant, by his counsel, at the time duly excepted, and at their request this their exception is signed and ordered made a part of the record herein; and to which order and ruling of the court sustaining the plaintiff's demurrer to the second defense and counter-claim in defendant's answer the defendant, by his counsel, duly excepted, and at their request this their exception is signed and ordered made a part of the record herein.

Dated at Deadwood, D. T., September 25, 1883.

WILLIAM E. CHURCH, *Judge.*

22 That thereupon, on the 25th day of September, 1883, the defendant declining to further plead and waiving further time so to do, the said cause was duly moved and called for trial, and the parties, by their counsel, in open court, duly waived a jury, and the parties, in open court, without prejudice, stipulated to allow the court to assess plaintiff's damages at one dollar, and the value of use and occupation at one dollar, and that the costs be taxed at eight dollars; and thereupon the court assessed plaintiff's damages at one dollar, and the value of the use and occupation of the premises at one dollar, and the costs were taxed at $8.00.

That thereupon, and on the 25th day of September, 1883, judgment was rendered by the court in said action; which judgment is as follows:

23 TERRITORY OF DAKOTA, } *ss*:
County of Lawrence, }

In District Court, First Judicial District.

ROBERT HAWKE, Plaintiff, *vs.* EDWARD DEFFEBACK, Defendant.

This action having come on to be heard upon an issue of law, to wit, the plaintiff's demurrer to defendant's first and second defenses and counter-claims, and the court, after hearing A. J. Plowman, counsel for the plaintiff, on behalf of said demurrer, and Albert Allen and W. C. Kingsley, counsel for the defendant, in opposition thereto, having made its order, sustaining the said demurrer to the first and second defenses and counter-claims, with leave to the defendant to amend, and counsel for defendant now declining to amend or to plead further, and waiving time and electing to stand upon the pleadings as filed and the ruling of the court, and counsel now in open court waiving a jury and stipulating, without prejudice, that the court may assess damages at one dollar, the
24 value of the use and occupation at one dollar, and the costs at eight dollars:

Now, on motion of plaintiff's counsel, it is ordered, considered, and adjudged that plaintiff recover of and from the defendant the possession of the premises described in the complaint, to wit:

That certain piece or parcel of land in Lawrence county, Dakota Territory, in Deadwood, being twenty-five feet in width, fronting on the easterly side of what is commonly called Sherman street, and running back therefrom one hundred feet in depth of the same width, said land being next on the northerly side of building recently occupied by N. Frank as a meat market, said land being part of mineral lot 53, as shown by the record of the U. S. patent recorded in the register of deeds office for Lawrence county.

And it is further ordered and adjudged that the plaintiff do have and recover of and from the said defendant the sum of one dollar damages, one dollar, the value of the use and occupation, and eight dollars costs, in all amounting to the sum of ten dollars, and that plaintiff have execution therefor.

Dated in open court this 25th day of September, 1883.

By the court: WILLIAM E. CHURCH, *Judge.*

25 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

In District Court in and for Lawrence County, First Judicial District, Dakota Territory.

ROBERT HAWKE, Pl'ff, *vs.* EDWARD DEFFEBACK, Def't.

I, the presiding judge of said district court, who presided at the trial of the above-entitled cause, do hereby certify that the foregoing papers, to wit, summons, the complaint, answer, demurrer, order sustaining said demurrer, defendant's exceptions to said order, and the judgment, are contained in and constitute the judgment roll, and the whole thereof, in the said above-entitled action, as the same now remains of record in the said district court.

Dated Deadwood, D. T., September 25th, 1883.

WILLIAM E. CHURCH, *Judge.*

26 In District Court of the First Judicial District of Dakota Territory within and for the County of Lawrence.

ROBERT HAWKE, Pl'ff, *vs.* EDWARD DEFFEBACK, Def't.

Take notice that the defendant in the above-entitled action hereby appeals to the supreme court of this Territory from the judgment rendered therein in the above district court of this Territory on the 25th day of September, A. D. 1883, in favor of the plaintiff in said action and against the defendant therein, and from the whole thereof, said judgment being for the recovery of possession of certain real property, and for the sum of one dollar damages, and one dollar, the value of the use and occupation of said premises, and the sum of eight dollars costs.

Dated this 25th day of September, A. D. 1883.

ALBERT ALLEN,
Defendant's Attorney.

To the clerk of the above district court and to A. J. Plowman, attorney for plaintiff.

27 In the District Court of the First Judicial District of the Territory of Dakota within and for the County of Lawrence.

ROBERT HAWKE, Pl'ff, *vs.* EDWARD DEFFEBACK, Def't.

Whereas, on the 25th day of September, 1883, judgment was rendered in the above-entitled action in favor of the plaintiff and against the defendant for the recovery of possession of certain real property, and for the sum of one dollar damages and one dollar, value of the use and occupation of said real property, and the sum of eight dollars costs;

And whereas the defendant intends to appeal from said judgment to the supreme court of this Territory:

Now, therefore, we, David H. Vaugher and Lucius C. Miller, undertake, pursuant to the statute, that the said appellant will pay all cost and damages which may be awarded against him on the appeal or on a dismissal thereof, not exceeding two hundred
28 and fifty dollars. And we do also undertake, pursuant to the statute, in the further sum of two hundred dollars, that during the possession of said property by said appellant he will not commit, or suffer to be committed, any waste thereon, or that if the said judgment be affirmed, or the appeal be dismissed, they will pay the value of the use and occupation of the said real property from the time of the appeal until the delivery of the possession thereof pursuant to the judgment.

DAVID H. WAUGHER.
LUCIUS C. MILLER.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

David H. Vaugher and Lucius C. Miller, being each for himself severally duly sworn, doth each for himself, and not one for the other, say that he is a resident and freeholder of the Territory of Dakota, & that he is worth double the sum specified in the foregoing undertaking over all his debts and liabilities, and exclusive of all property exempt by law from execution by the laws of this Territory.

DAVID H. VAUGHER.
LUCIUS C. MILLER.

Subscribed & sworn to before me, this 25th day of September, A. D. 1883.

[SEAL.] JOHN R. WILSON,
Notary Public.

29 TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

On this day, before the undersigned, a notary public in and for said county and Territory, personally appeared David H. Vaugher and Lucius C. Miller, known to me to be the persons named in & who subscribed the foregoing undertaking, and acknowledged to me

that they executed the same for the use & purposes therein mentioned.

In witness whereof, I have hereunto set my hand and notarial seal, this 25th day of September, A. D. 1883.

[SEAL.] JOHN B. WILSON.

30 Endorsement: In district court, Lawrence county. Robert Hawke *vs.* Edward Deffeback. Notice and undertaking on appeal. Due service of a copy of the within notice and undertaking on appeal admitted this 25th day of September, A. D. 1883, and all objections to the form, amount, and sufficiency of said undertaking and the sureties thereon are hereby waived. A. J. Plowman, plaintiff's attorney. Filed Sept. 25, 1883. A. R. Z. Dawson, clerk.

31 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

First Judicial District.

I, A. R. Z. Dawson, clerk of the district court within and for the said county of Lawrence, in the first judicial district of the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript of the judgment roll as follows: Summons, complaint, answer, demurrer, order sustaining said demurrer, defendant's exception to said order, minutes of the court, judgment, certificate of the judge, notice of appeal, and undertaking on appeal in the above-entitled action, wherein Robert Hawke is plaintiff and Edward Deffeback is defendant, as the same now remains of record in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 27th day of September, A. D. 1883.

[SEAL.] A. R. Z. DAWSON, *Clerk.*

32 [Endorsed:] No. 156. In district court, Lawrence county. Robert Hawke *vs.* Edward Deffeback. Summons, complaint, answer, demurrer, order sustaining demurrer, minutes of the court, judgment, certificate of the judge, notice of appeal, undertaking on appeal, and certificate of clerk. Filed Oct. 3d, 1883. B. S. Williams, clerk. Albert Allen, att'y for pl'ff.

33, 34, and 35 U. S. Supreme Court. October Term, A. D. 1883. 5th day of Term.

SATURDAY, *October 6th*, 1883.

In the Supreme Court, Territory of Dakota.

ROBERT HAWKE, Respondent,

vs.

EDWARD DEFFENBACK, Appellant.

It is hereby stipulated by and between the parties appellant and respondent in the above cause that the same may be do-keted for hearing and determination at the present October, 1883, term of the

above court, with the same effect as though the transcript herein had been filed and the abstracts and briefs served and filed in proper time for the said term. The parties hereby expressly waiving the service of brief and abstract.

Yankton, D. T., Oct. 5, 1883.

ALBERT ALLEN,
Att'y for Appellant.
ADONIRAM J. PLOMMER,
Att'y for Respondent.

36 U. S. Supreme Court. October Term, A. D. 1883. 5th day of Term.

SATURDAY, *October 6th*, 1883.

ROBERT HAWKE, Respondent,
vs.
EDWARD DEFFENBACK, Appellant.

On the foregoing stipulation ordered that this cause be docketed and placed upon the calender of this court for hearing and determination at the present October, A. D. 1883, term of said court.

Done in open court, this 5th day of October, A. D. 1883.

By the court: A. J. EDGERTON.

Filed October 5, 1883. B. S. WILLIAMS, *Clerk*.

37 U. S. Supreme Court. October Term, A. D. 1883. 8th day of Term.

WEDNESDAY, *October 10th*, 1883.

ROBERT HAWKES, Respondent,
vs.
E. DEFFENBACK, Appellant. } No. 156.

ROBERT HAWKES, Respondent,
vs.
DOLPH EDWARDS, Appellant. } No. 157.

MOSES PIERCE *et al.*, Respondents,
vs.
P. E. SPARKS *et al.*, Appellants. } No. 158.

And now, this 10th day of October, 1883, the above-entitled causes, numbered from 156 to 158 inclusive, came on for argument & hearing together, by consent of counsel and the permission of the court.

Albert Allen, Esq., appears for the appellants in each case.

38 U. S. Supreme Court. October Term, A. D. 1883. 9th day of Term.

THURSDAY, *October* 11*th*, 1883.

Court being duly opened, the following proceedings were had, to wit:

ROBERT HAWKE, Respondent,
vs.
ED. DEFFENBACK, Appellant. } No. 156.

ROBERT HAWKE, Respondent,
vs.
DOLPH EDWARDS, Appellant. } No. 157.

MOSES PIERCE *et al.*, Respondents,
vs.
P. E. SPARKS *et al.*, Appellants. } No. 158.

And now Albert Allen, for appellant, continuing his argument.

And now, at 11 o'clock a. m., comes A. J. Plowman, att'y for Robt. Hawkes, respondent, in the above cases.

39 U. S. Supreme Court. October Term, A. D. 1883. 10th day of Term.

FRIDAY, *October* 12, 1883.

Court being duly opened, the following proceedings were had, to wit:

ROBERT HAWKES, Respondent,
vs.
ED. DEFFENBACK, Appellant. } No. 156.

ROBERT HAWKE, Respondent,
vs.
DOLPH EDWARDS, Appellant. } No. 157.

MOSES PIERCE *et al.*, Respondents,
vs.
P. S. SPARKS *et al.*, Appellants. } No. 158.

The above cause coming on for further argument, comes A. J. Plowman, Esq., for Robert Hawke, said respondent, and now Edwin Van Cise, Esq., for Moses Pierce *et al.*, respondents, and Albert Allen with closing argument for said appellant, and thereupon cause submitted to the court.

40 THE UNITED STATES OF AMERICA, } *ss*:
Territory of Dakota, }

In the Supreme Court. May Term, 1884.

ROBERT HAWKE, Plaintiff & Respondent,
vs.
EDWARD DEFFENBACK, Defendant & Appellant.

Appeal from the district court of Lawrence county.

This action coming on to be heard at the May, A. D. 1884, term of said supreme court at the supreme court room in the city of Yank-

ton, D. T.—present, A. J. Edgerton, chief justice, and S. A. Hudson, Wm. E. Church, and C. S. Palmer, associate justices—and the appeal herein having been argued by Albert Allen, Esq'r., for the appellant, and by A. J. Plowman, Esq'r., for the respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Lawrence county, appealed from herein, be, and the same is hereby, affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings, according to law and the judgment of this court.

And it is further considered and adjudged that respondent have and recover of the appellant his costs and disbursements on this appeal expended, taxed and allowed at sixteen and $\frac{55}{100}$ dollars.

By the court: A. J. EDGERTON,
Chief Justice Supreme Court, D. T.

Church & Hudson, A. J., for affirmance.

Edgerton, C. J., dissenting.

Judge Palmer, not being present at the argument, took no part in the decision.

[Endorsed:] In supreme court, Territory of Dakota. May term, 1884. Robert Hawke *vs.* Edward Deffenback. Filed this 23 day of May, 1884. B. S. Williams, clerk.

41 ROBERT HAWKE, Plaintiff and Respondent,
versus
EDWARD DEFFEBACK, Defendant and Appellant.

To the Honorable the Supreme Court of the United States:

The appeal of Edward Deffeback, the above-named defendant and appellant, respectfully showeth: That upon the 20th day of June, 1882, the above-named plaintiff brought his action in the district court for Lawrence county, Dakota Territory, against the above-named defendant and appellant, wherein he sought to recover the possession of certain real property in his complaint described, together with damages for the withholding thereof. The said defendant therein answered, as by the procedure of said Territory he might, alleging that he was the equitable owner of said property; that the plaintiff was the holder of the legal title, which was held by him contrary to equity and good conscience, and charging him, said plaintiff, as trustee, and praying that he be decreed to convey such legal title to said defendant. Afterwards, in said court, the plaintiff demurred to said defendant's answer, and such pro-
42 ceedings were had that on the 25th day of September, 1883, a final judgment was made and pronounced in the cause in said district court, wherein it was, in substance, adjudged that the plaintiff was the owner of and entitled to the possession of the said premises, and that said plaintiff have and recover of said defendant the possession thereof, with damages and costs; that afterwards an appeal was taken and perfected in said cause from the said judg-

ment of the said district court (said cause having been tried and determined without a jury) to the supreme court of Dakota Territory.

That on the 23d day of May, 1884, a final decision and judgment was pronounced and rendered in said action by the supreme court, wherein the said judgment of the said district court of Lawrence county was in all things affirmed with costs.

Whereupon this appellant appeals from the whole of said judgment of the said supreme court of Dakota Territory, and respectfully prays that the judgment of the said supreme court, and all the transcript and record and proceedings in the said action, may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear and de-
43 termine said cause, and that the said judgment of the supreme court of the Territory and of the said district court, and every part thereof, and of each thereof, may be reversed, and a trial and hearing be awarded said defendant in said district court, and that he have costs or such other judgment and decree as to the said Supreme Court of the United States shall seem just.

Dated Yankton, Dakota Territory, May 23d, 1884.

G. C. MOODY,
Attorney and Counsellor for Defendant and Appellant.

The foregoing appeal allowed, this 23d day of May, 1884, in open court.

By the court: A. J. EDGERTON,
Chief Justice.

[Endorsed:] In supreme court. May term, 1884. Robert Hawke, plaintiff and respondent, *vs.* Edward Deffenback, defendant and appellant. Appeal. Filed May 23d, 1884. B. S. Williams, clerk.

44 TERRITORY OF DAKOTA, *ss:*

In Supreme Court of said Territory.

ROBERT HAWKE, Plaintiff and Respondent,
versus
EDWARD DEFFEBACK, Defendant and Appellant.

Now comes G. C. Moody, counsel for the above-named defendant, Edward Deffeback, and prays this honorable court that an appeal to the Supreme Court of the United States from the decision and judgment of the supreme court now sitting, rendered in the above-entitled cause on the 23d day of May, A. D. 1884, be allowed said Edward Deffeback, defendant, and that the security provided by law be fixed, and the bond and undertaking therefor, together with the surety, be authorized to be approved by the chief justice of the supreme court of said Territory.

Dated May 23d, 1884.

G. C. MOODY,
Counsel for Defendant, Edward Deffeback.

And now, May 23d, 1884, the above petition being presented in open court and considered, it is by the court—

Ordered, That the said appeal be, and the same is hereby,
45 allowed, and the bond to operate as a supersedeas, and for costs, to be fixed at one thousand dollars, with surety to be approved by the chief justice of this court.

By the court: A. J. EDGERTON,
Chief Justice.

[Endorsed:] In supreme court. May term, 1884. Robert Hawke, plaintiff and respondent, *vs.* Edward Deffeback, defendant and appellant. Allowance of appeal. Filed May 23d, 1884. B. S. Williams, clerk.

46 *Assignment of Errors.*

ROBERT HAWKE, Plaintiff and Appellee,
vs.
EDWARD DEFFEBACH, Defendant and Appellant.

And the appellant herein says that there is manifest error on the face of the record, in this:

The supreme court of the Territory erred in affirming the judgment of the district court, which district court had sustained the demurrer of the plaintiff to the first defense and counter-claim set up in defendant's answer, and gave judgment thereon in favor of the said plaintiff and against said defendant.

Second. Because the said district court had also sustained the demurrer of the plaintiff to the second defense and counter-claim in defendant's answer, and had given judgment thereon in favor of said plaintiff and against said defendant.

To each of said rulings and decisions the defendant had duly excepted.

Wherefore appellant prays that the said judgment herein
47 rendered by the said supreme court of the Territory of Dakota and by said district court may by this Supreme Court be reversed, and this appellant restored to all things which he has lost by reason of such errors and said judgment.

G. C. MOODY,
Counsel for Defendant and Appellant.

[Endorsed:] In supreme court. May term, 1884. Robert Hawke, plaintiff and appellee, *vs.* Edward Deffebach, defendant and appellant. Assignment of errors. Filed May 23d, 1884. B. S. Williams, clerk.

48 TERRITORY OF DAKOTA, *ss:*

In Supreme Court of said Territory.

ROBERT HAWKE, Plaintiff and Respondent,
versus
EDWARD DEFFEBACK, Defendant and Appellant.

And now on this 23d of May, 1884, comes G. C. Moody, one of the

attorneys for the above-named defendant, Edward Deffebach, and it appearing that the said defendant has prayed an appeal to the Supreme Court of the United States from the judgment of this court herein, which appeal has been allowed, it is by the court ordered that the proceedings this action be stayed for the period of ninety days from this date, to enable said defendant to perfect his said appeal, except the clerk is authorized to tax and insert in the judgment of affirmance the costs of the appeal to this court.

By the court: A. J. EDGERTON,
Chief Justice.

[Endorsed:] In supreme court. May term, 1884. Robert Hawke, plaintiff and respondent, *vs.* Edward Deffebach, defendant and appellant. Order staying proceedings on appeal. Filed May 23d, 1884. B. S. Williams, clerk.

49 In Supreme Court, Dakota Territory.

ROBERT HAWKE, Respondent, *vs.* EDWARD DEFFENBACH, Appellant.

It is hereby stipulated that the clerk of this court may tax and insert in the judgment in the above-entitled action the costs of respondents, amounting to the sum of eight dollars.

Dated July 26th, 1884. A. J. PLOWMAN,
Att'y for Respond't.
G. C. MOODY,
Att'y for Appellant.

50 UNITED STATES OF AMERICA,
Territory of Dakota, County of Lawrence.

Edward C. Bent, being duly sworn, says: That he is a resident of Lawrence county, in said Territory; that he is the agent and attorney-in-fact for Edward Deffeback one of the parties named in a certain action, lately pending in the supreme court of the Territory of Dakota, in which Robert Hawke was plaintiff and respondent and said Edward Deffeback was defendant and appellant, wherein at the May term of said court, A. D. 1884, the judgment of the district court was affirmed; that said judgment so affirmed was recovered by the said Robert Hawke against said Edward Deffeback in the district court for Lawrence county, Dakota Territory, on the 25th day of September, A. D. 1883, for the recovery of the possession of certain real property in said plaintiff's complaint mentioned and described; and the said judgment is now in full force and wholly unsatisfied, and that the value and amount of real property and matter in dispute in said action, exclusive of costs, at the time of the rendition of said judgment in said district and supreme courts, and at the present time, exceeds one thousand dollars, and covers the whole of said real estate and property affected by said judgment so affirmed as aforesaid.

EDWARD C. BENT.

Subscribed and sworn to before me, this 3d day of June, 1884.

[SEAL.] A. R. Z. DAWSON,
Clerk U. S. District Court, 1st Judicial Dist., Dakota Territory.

51 UNITED STATES OF AMERICA, } ss:
County of Lawrence, Territory of Dakota, }

Lucius C. Miller, being first duly sworn, deposes and says that he is a resident of the city of Deadwood, in said Lawrence county; that he is personally well acquainted with the lands and premises in controversy in the action mentioned in the foregoing affidavit of Edward C. Bent, in which action judgment was rendered by the district court of Lawrence county and affirmed by the supreme court of said Dakota Territory, and that the lands and premises so in controversy were at the time of the rendition of said judgment and at the time of the affirmance thereof by said supreme court, and are now, worth more than one thousand dollars, and that the value of the property in controversy in said action exceeds one thousand dollars over and above all costs.

LUCIUS C. MILLER.

Subscribed and sworn to before me, this 3d day of June, A. D. 1884.

A. R. Z. DAWSON,
Clerk U. S. Dist. Court, 1st Judicial District, Territory of Dakota.

[Endorsed:] In Supreme Court of United States. Robert Hawke *vs.* Edward Deffeback. Filed July 10th, 1884. B. S. Williams, clerk.

52 Supreme Court of the United States.

ROBERT HAWKE, Plaintiff and Appellee,
vs.
EDWARD DEFFEBACK, Defendant and Appellant.

Know all men by these presents, that we, Edward Deffeback and Julius Deetken, Henry H. Kiemer, Edward C. Bent, of Lawrence county, Dakota Territory, are held and firmly bound unto Robert Hawke, of said county, in the sum of one thousand dollars, to be paid to the said Robert Hawke, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and ours, and each of ours, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, dated this 3d day of July, A. D. 1884.

Whereas the above-named Edward Deffeback hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the district court of Lawrence county, Dakota Territory, which judgment was affirmed by the supreme court of said Territory:

53 Now, therefore, the condition of this obligation is such, that if the above-named Edward Deffebach shall prosecute his said appeal to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

EDWARD DEFFEBACH, [SEAL.]
By E. C. BENT, *Attorney-in-Fact.*
LUCIUS DEETKEN. [SEAL.]
HENRY H. KIEMER. [SEAL.]
EDWARD C. BENT. [SEAL.]

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Before me, Frank J. Waszabaugh, a notary public in and for said county and Territory, on this 3d day of July, A. D. 1884, personally came the above-named Edward C. Bent, Julius Deetken, and Henry H. Kiemer, to me personally well known to be the persons described in and who executed the foregoing instrument, and each severally duly acknowledged that he executed the same freely for the uses and purposes therein expressed.

Witness my hand and notarial seal, at said county, this 3d day of July, A. D. 1884.

[SEAL.] FRANK J. WASZABAUGH,
Notary Public.

54 UNITED STATES OF AMERICA, } ss:
Territory of Dakota, County of Lawrence, }

Julius Deetken and Henry H. Kiemer & Edward C. Bent, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of two thousand dollars over and above all his just debts and liability in property situated in said county of Lawrence, not exempt from execution.

JULIUS DEETKEN.
HENRY H. KIEMER.
EDWARD C. BENT.

Subscribed and sworn to before me, this 3d day of July, A. D. 1884.

Witness my hand and seal of office, at Deadwood, Dakota.

[SEAL.] FRANK J. WASZABAUGH,
Notary Public.

I approve the above bond and the sufficiency of the sureties thereto.

Dated Yankton, Dakota Territory, this 10th day of July, A. D. 1884.

A. J. EDGERTON,
Chief Justice of Supreme Court, Dakota Territory.

55 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

On the 3d day of July, 1884, before me, Frank J. Waszabaugh, a notary public within and for said county and Territory, personally appeared Edward C. Bent, known to me to be the person who is described in and whose name is subscribed to the within instrument as the attorney-in-fact of Edward Deffeback, and acknowledged to me that he subscribed the name of Edward Deffeback thereto as principal, and his own name as attorney-in-fact.

Witness my hand and notarial seal, the day and year last above written.

[SEAL.] FRANK J. WASZABAUGH,
Notary Public.

Filed July 10th, 1884. B. S. WILLIAMS, *Clerk.*

56 By the Honorable Alonzo J. Edgerton, chief justice of the supreme court of Dakota Territory, to Robert Hawke, plaintiff:

Whereas Edward Deffeback has lately appealed to the Supreme Court of the United States from a judgment of affirmance of a judgment lately rendered in the district court of Lawrence county, in said Territory, in favor of you, the said Robert Hawke, against him, the said Edward Deffeback, in an action tried and determined without a jury, and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court of the United States, at the city of Washington, on the first day of the next succeeding term of said court, to wit, on the 13th day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Yankton, in the Territory of Dakota, on the 10th day of July, in the year of our Lord one thousand eight hundred and eighty-four.

A. J. EDGERTON,
Chief Justice of Supreme Court of Dakota Territory.

[Endorsed:] In supreme court. May term, 1884. Robert Hawke, plaintiff, *vs.* Edward Deffeback, defendant & appellant. Filed May 23d, 1883. Citation to plaintiff. Filed July 10th, 1884. B. S. Williams.

57 UNITED STATES OF AMERICA, } *ss:*
Territory of Dakota, }

I, B. S. Williams, clerk of the supreme court of the Territory of Dakota, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office, and that they constitute a full, true, correct, and complete transcript and copy of the record in the foregoing cause, as the same now remains of record in my said office.

In testimony whereof, I have caused the seal of said court to be hereunto affixed at the city of Yankton, in the Territory of Dakota, this 21st day of August, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the said United States the one hundred and ninth.

[SEAL.] B. S. WILLIAMS, *Clerk.*

58 Supreme Court of the United States.

ROBERT HAWKE *v.* EDWARD DEFFEBACK.

Appeal from sup. ct. of Dakota.

Due service of citation and appeal to the Supreme Court of the United States in the above-entitled action is made this 16th day of July, 1884, admitted.

A. J. PLOWMAN,
Att'y for Pl'ff & Appellee.

59 In the Supreme Court of the United States.

ROBERT HAWKE, Appellee, *vs.* EDWARD DEFFEBACK, Appellant.

TERRITORY OF DAKOTA,
First Judicial District, County of Lawrence. } *ss:*

G. C. Moody, being first duly sworn, saith: That on the 16th day of July, 1884, at Deadwood, in said county and district, he served on the above-named appellee a copy of the appeal and a copy of the citation filed in this cause with the clerk of the supreme court in and for the Territory of Dakota, by delivering said copy of the appeal and citation to A. J. Plowman personally, the attorney for the said appellee, who signed the annexed admission of service.

G. C. MOODY.

Subscribed and sworn to before me, this 16th day of July, A. D. 1884.

[SEAL.] S. M. HOUGHTON,
Notary Public.

60 [Endorsed:] In the supreme court of Dakota Territory. Robert Hawke *vs.* Edward Deffebach. Affidavit of service of copy of appeal and citation.

Endorsed on cover: Dakota Territory supreme court. No. 913. Edward Deffebach, appellant, *vs.* Robert Hawke. Filed 5th September, 1884.

115-392

Office Supreme Court U. S.
FILED.
OCT 7 1885
JAMES H. McKENNEY.
CLERK.

ARGUMENT OF APPELLANT'S COUNSEL.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 564.

EDWARD DEFFEBACH, *Appellant*,

vs.

ROBERT HAWKE, *Appellee*.

G. C. MOODY, *Counsel for Appellants*,

A. J. PLOWMAN, *Counsel for Appellee*.

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1885.

No 564.

EDWARD DEFFEBACH,
Appellant,
vs.
ROBERT HAWKE,
Appellee.

APPEAL FROM DAKOTA TERRITORY.

G. C. MOODY, *Counsel for Appellant.*

A. J. PLOWMAN, *Counsel for Appellee.*

APPELLANT'S ARGUMENT.

In case No. 563, Sparks, et. al., vs. Pierce, et. al., involving substantially the same questions that are presented in this appeal, I have treated generally of those questions, and shall not repeat the argument here, but will append that argument to this case, and make it a part of what I desire the Court to consider in this appeal.

It remains only to note the difference in the facts as they are plead, between this and No. 563. The questions here are also raised by Demurrers to the Answers.

The complaint of the Appellee alleges that on the 20th of November, 1877, he duly filed his application in the United States Land Office, at Deadwood, Dakota, to enter certain lands

as a placer mining claim under the laws of the United States, and that on the 31st. day of January, 1878, he duly entered the same as a placer mining claim, paid the Government price therefor, and on the 31st. of January, 1882, a Patent was executed and delivered to Appellee, whereby Appellee became the owner of said lands, which were designated as Mineral Lot No. 53.

That upon the 1st day of July, 1878, the Appellant entered upon a portion of said premises, a part of said Mineral Lot No. 53, described as a lot 25x100 feet, fronting on Sherman Street, in the City of Deadwood, and that Appellant still withholds the possession, and Appellee is thereby damaged.

The Appellant, in his answer, after denying all of Plaintiff's allegations, except such as are thereafter admitted, admits the entry and the issuance of the patent.

The answer then contains two pleas by way of counter-claim, upon which affirmative relief is demanded.

The first of these is in the nature of a bill in equity, to charge the Appellee as trustee for Appellant of the title to said lot, and the second counter-claim alleges facts to entitle Appellant to relief under the Betterment Acts of the Territory.

As has been said in No. 563, this mode of pleading in an action of ejectment, is allowable by the Code practice of Dakota.

The first counter claim alleges that on the 28th day of February, 1877, being the date of the ratification of the treaty with the Sioux Indians by which the lands in Lawrence county were first open to occupation and settlement, the lands included within the boundaries of the said Mineral Lot 53, together with a large amount of other lands in the vicinity thereof and adjacent thereto, were lawfully appropriated, selected, used and occupied for town-site purposes, and as such were surveyed and laid out into lots, blocks, streets and alleys, for municipal business and trade, were called Deadwood, and contained a population of at least two thousand inhabitants, with five hundred buildings, used and occupied for dwellings and municipal business and trade, and at the time of the commencement of the action contained three thousand five hundred inhabitants, and on the 28th of February, 1877, the buildings and improvements permanent in character were of the value of two hundred thousand dollars, and at the time of the commencement of the action were of the value of one million dollars. That the lot in controversy is situated in said Deadwood

town-site, was one of the lots so originally laid out, used and occupied for town-site purposes, and was during all the time from the 28th of February, 1877, occupied by the appellant and his grantors as a town lot, for the purposes of business and trade in said city, and that the buildings and improvements thereon were erected by the appellants and his grantors, and thus actually occupied long prior to the location of said placer mining claim, and has at all times since been so occupied.

That on the 29th day of July, 1878, the Probate Judge of Lawrence county entered at the Land office at Deadwood the said town-site of Deadwood, paid the Government price therefor, and received from the Receiver a certificate showing said entry and purchase, by said Probate Judge, in trust for the use and benefit of the occupants thereof, including appellant.

That thereafter and on the 10th day of April, 1879, the commissioner of the General Land Office at Washington ordered a hearing before the Land Office at Deadwood, between the appellee and the said Probate Judge, the Trustee for the appellant and other occupants, as to the character of said land for mineral purposes, at which hearing it was undisputed and admitted that the appellant and other occupants of town lots in said city were the prior appropriators of the land, but the Commissioner refused to permit the consideration of any other fact than as to the character of said land for mineral purposes, deciding as a proposition or question of law decisive of and controlling the case, and the rights of the said parties, that the only question of fact that could be considered or determined in said case was the mineral or non-mineral character of the land. And decided that the fact of the prior occupation and appropriation of said land for town-site purposes did not confer any rights whatever upon the occupants of said town, including the appellant.

That the Register and Receiver followed these instructions and decided the controversy solely upon the ground of the mineral character of the land. That upon appeal to the Commissioner of the General Land Office, and thence to the Secretary of the Interior, this decision was affirmed, and the land, together with all the improvements of the appellant were awarded to the appellee.

That upon the review by the Commissioner and Secretary there was no dispute as to the fact that this appellant and other of the town-site occupants were the first appropriators of the land; that this appellant occupied and used the lot in controversy prior to any appropriation and location by the appellee, and was a bene-

ficiary under the trust, but those officers decided, as a matter of law, that because the land was valuable for mineral, therefore there was not and could not be any settlement or appropriation thereof for townsite purposes, nor could the Department give any recognition or protection to the inhabitants thereof, including the appellant, but that said lands and all the improvements thereon were the property of the appellee, the subsequent mineral claimant, and said lands, including this appellant's property, were awarded to the appellee, and the entry theretofore made by the Probate Judge was cancelled, notwithstanding the then settled and long established rule of the Land Department to the contrary.

It will thus be seen that the Appellant was in the actual occupation of this particular lot, several months prior to any attempt by the Appellee to gain the right of possession thereof, by virtue of a location of a mineral claim, and by reverting to the further defense, it will be seen that the building thereon was of a permanent character.

In the hearing that was ordered it will be further observed there was no direction to take evidence of the fact whether any vein or mine of the valuable metals existed in the land, but only in a general way the character of the land for minerals was enquired into. Mines and minerals exist in the land, and therefore any lands in the vicinity of mines or veins are usully termed mineral lands—that is, lands in which at occasional places are found minerals.

It is fairly inferable from the allegations in this counter claim, that it was proven that valuable minerals existed in occasional spots in this town-site, and therefore they were held to be mineral lands.

It cannot be presumed, as said in the other case, that parties were in or under the buildings of Appellant, searching for minerals. It is this loose, unsatisfactory and unjust decision of the legal question involved of which we complain.

If the direction had been to the Register and Receiver to enquire whether there existed in the lands selected for a town-site, any vein or mine of gold, silver, cinnabar or copper, and if so, in what part or portion of the lands included in said town-site such veins or mines existed, the enquiry would have been pertinent and to the purpose under the law, and all parties would have been bound by the decision of the Department upon those questions of fact. So also, if the enquiry had been as to the existence of a valid prior mining claim or possession, but when the Depart-

ment ignored these pertinent questions, and held simply that lands containing valuable minerals, or such lands as are usually denominated mineral lands, the meaning of which is well known to be not only those portions of the land containing the vein or the mine, but the lands contiguous thereto, situated in the same district of country, were not subject, under any circumstances, to settlement and occupation as a town-site, the settler of such town-site was injuriously prejudiced thereby, and though even no vein or mine existed upon his lot he could acquire no title thereto through the Land Department. His hands were tied, and he had to yield to the mineral claimant without other remedy than through the courts.

It will be seen in this case that the Probate Judge was allowed to and did make the entry of these lands, and did all that was possible for him to do in the execution of his trust, to acquire the title thereto, and that the former practice of the Department allowed this to be done, issuing to the mineral claimant title to the valuable minerals, and to the town-site occupants the title to the surface and all superstructures, thus leaving to the local Legislature the regulating of the manner of exercising these respective rights. There is practically very little difficulty in adjusting the respective rights between the claimants to the mine or vein with sufficient ground for working purposes, and the occupants of the surface superstructures.

However, in this case no attempt has been made by the Department to make any distinction between the lands and the mine or vein, and simply because, in a general way, it appeared to such Department that these lands were mineral lands, the town-site occupants have been excluded altogether from any part of them, whether such lands contained a vein or mine or did not.

In this case there can be no question but that the appellant has the right to require the appellee to convey, if the Judge of Probate had the right to enter these lands, for it is admitted by the demurrer that he was a beneficiary in the trust.

If the real and only pertinent questions, to wit: whether this particular lot contained any vein or mine of gold, silver, cinnabar, or copper, or was included within any valid mining claim or possession held under existing laws; have not been tried before the Land Department, it is no fault of the appellant, or of his trustee, because the only enquiry open under the Land Department decision was the mineral or non-mineral character of the land. Certainly no presumpion can now be indulged in that it

did contain a mine or vein, or was thus included in a mining claim or possession, and the appellee can be fully protected so far as his legal rights are concerned, if our view is a correct one, that lands, notwitstanding they are mineral in character, when unappropriated, may be occupied and the title acquired thereto under the town-site act, by awarding just such a decree as is prayed for in the answer directing the appellee to convey to the appellant the premises in controversy, excepting and reserving to the appellee the right to mine and extract the precious metals from the ground under such regulations as the local legislature has or may prescribe.

By the act of the 26th of July, 1866, Volume 14, U. S. Statutes at Large, page 252, incorporated into the revision as section 2338, there seems to be authority sufficient to authorize these local regulations. That section is as follows:

"As a condition of sale in the absence of necessary legislation "by Congress, the local Legislature of any State or Territory "may provide rules for working mines involving easements, "drainage, and other necessary means to their complete develop- "ment; and those conditions shall be fully expressed in the pat- "ent."

Now, it is apparent in this case, by the facts as they appear admitted, that when the Black Hills country was lawfully opened to settlement and occupation as a part of the public domain, becoming such by reason of the abrogation of the Sioux Indian reservation, which covered that country, there existed at the confluence of Deadwood and Whitewood guiches, an important town of at least two thousand inhabitants, engaged in all the business and avocations which such an aggregation of people induce, and which grew rapidly in population thereafter.

This town was situated in close proximity to what is a well-known rich quartz mining district or locality. That the lands were mineral in character—that is, that more or less deposits of gold had been brought down from the mines above and found in occasional places in the land whereon the town was situated, was a question hardly worth the trying. That the appellee in this case, finding the town there, with all its accumulated wealth of structures, including dwelling houses, business blocks, banking houses, hotels, churches, school houses, court house, and other public buildings—it was a county seat for a large and populous county—went upon the unoccupied portion of this town, there found gold, and making his location long after the appropriation of these public lands by the town-site occupants, upon the single theory

that the lands on which the town is located are mineral in character, is awarded all the lands, the superstructures as well, and people who relied upon the good faith of the Government and the hitherto unbroken rule of the Land Department, were despoiled of their possessions and all the expenditures which they, in good faith, had made to improve this property, and that without even the privilege of making the negative proof of the non-existence in any particular occupied portion of such town, that therein there existed no vein or mine of the precious metals, and there was no pretense of there being any pre-existing mining claim or possession covering those lands.

Can this decision, so transparently unjust, be upheld, or the effect of it enforced by any attempted evasion by the appellee of the real question which was decided by the Department?

The counter claim for the value of the betterments, it seems to me, states a case which, under the law of the Territory as affirmed by the act of Congress and made to apply to the public lands, entitles the appellant to have the value of his improvements found, and to recover the same from the appellee if the Court shall not conclude that the appellant is entitled to a conveyance.

The statute of the Territory and the law of Congress giving effect to it in its application to the public lands, are set out at length in the argument in case No. 563, which argument is hereto appended.

The improvements made by the appellant and the person under whom he claims are alleged to be permanent improvements; the appellant was holding under color of title adversely to the claim of the appellee in good faith, and the value of such improvements is alleged. These facts ought to be sufficient to entitle the appellant to the judgment which he prayed for relating thereto.

The same views expressed in case No. 563, upon this subject, apply here, and as it is a question of very grave importance to people occupying lands in which the Government still retains the title, we ask the careful consideration of the Court thereupon.

Because of the important interests at stake in these questions and the necessity for an early adjudication, and the complications which will be likely to arise by the delay necessary to an oral presentation, both parties have consented to a submission of these test cases upon written argument.

For the appellants I have not deemed it necessary to cite cases supposed to be analogous, for except those questions here which are comparatively new and depend upon the construction which this Court shall now give to the laws of Congress relating to this character of lands, all that are involved are quite familiar, and the only question is, do the facts plead bring the cases within these familiar rules in equity, or within the provisions of the Betterment Act of the Territory and the law of Congress giving force to it in its application to the public lands.

Respectfully submitted,

G. C. MOODY,

COUNSEL FOR APPELLANT.

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1885.

No 563.

PHILANDER E. SPARKS, AND FRANK M. ALLEN,
Appellants,

vs.

MOSES PIERCE, GEORGE BERGHOFFER, JAMES McALEER, AND MARY A. BOGLE, *Appellees.*

APPEAL FROM DAKOTA TERRITORY.

G. C. MOODY, *Counsel for Appellants,*
VAN CISE & WILSON, J. A. SMITH, *Counsel for Appellees.*

APPELLANTS' ARGUMENT.

This, and No. 564, are test cases from a large number now pending in the lower courts, involving the respective rights of townsite and mineral claimants upon the public mineral lands of the United States, in Central City, and Deadwood, Dakota.

The two cases may well be considered by the Court together, but the same counsel not being employed for the Appellees in both cases, and there being some difference of opinion among the counsel as to the questions involved, we are unable to submit the arguments together, though necessarily, in order to prevent repetition, I shall refer from one to the other, and furnish both counsel with my arguments.

The decisions of the Land Department have not always been uniform upon the questions here presented, nor am I aware of any decisions of this Court which directly touch upon the very question at issue in these cases.

Two principal questions are involved.—

FIRST:—Are the public unoccupied mineral lands of the United States of that character of lands which, under any circumstances, will admit of their occupancy and appropriation as town-sites, and can title thereto be legally acquired under the town-site acts of Congress?

SECOND:—Do the Betterment Acts of the States and Territories, as such acts are recognized and affirmed by Congressional enactment, apply to such lands?

Upon the first question, as I have said, the decisions of the Land Department have not been uniform.

As I understand those decisions, the Department originally allowed the town-site settlers to acquire title to such lands, subject to the right to mine and extract the precious metals therefrom. Subsequently, and during the time of the pendency of the controversies in these cases, the Department held, and so decided in these cases, that under no circumstances were mineral lands subject to entry as townsites. Still later, which is now the rule, the original decisions were, and are, adhered to, and the rights of the town-site settlers again recognized.

The questions in these cases are raised by demurrers to the answers.

The action was commenced as an action of ejectment with damages. The Code of Practice of Dakota authorizes, in such actions, answers in the nature of equitable defenses, and permits a party, by way of counter-claim, to allege facts which will entitle him, in the same action, to affirmative equitable, as well as legal, relief.

The appellees, in their complaint, in substance allege: That on the 11th of December, 1878, they were the owners, seized in fee, and lawfully possessed of certain placer mining ground situated in Lawrence county, Dakota Territory, deriving their title thereto from an entry and purchase thereof from the United States Government, November 30th, 1877, which entry was subsequently confirmed by patent of date March 22, 1880. They then allege an entry and ouster by the appellants, and a continued withholding.

The appellants, in their answer, allege that on the 28th of February, 1877, the premises described in the complaint, together with other lands contiguous thereto, were lawfully selected, appropriated, located, used and occupied for and as a townsite, and for town-site purposes, and as such were laid out into lots, blocks, streets and alleys, and known and designated as Central City; that such town was thus located upon the unappropriated lands of the United States; that at that time it contained a population of about one hundred inhabitants, and thenceforth grew with great rapidity until, on the 22d of March, 1880, the date of appellees' patent, it was an important town, containing about two thousand inhabitants; that on the said 28th of February, 1877, the grantor of the appellants was in possession of the disputed ground as a town-site lot, and that it has been ever since so occupied by him and his successors in interest, these appellants.

The answer further alleges that, long after this property and the lands adjacent had been selected, and while they were being used for the purposes of business and trade exclusively, the appellees made claim to the ground in controversy, and had it surveyed as a placer claim, and made application for a patent thereto under the mineral land laws; that to such application the inhabitants of said town protested at the proper local land office, alleging their prior appropriation as town-site occupants, and such proceedings were thereafter had that on the 22nd of April, 1878, the Commissioner of the General Land Office directed that patent issue to the mineral claimants, with the exception or reservation saving and reserving from the grant all town property rights upon the surface, and all lots, blocks, streets and alleys, and all houses, buildings and improvements thereon not belonging to the placer claimants, and all rights necessary and proper to occupation and enjoyment of the same in accordance with the long established and settled practice of the Land Department in such cases.

That thereafter, on November 7th, 1878, and without any appeal having been taken from said decision, the Commissioner made an order suspending said entry, and ordered that a hearing be had before the officers of said local land office, to determine the date when said land was first occupied as a town, the character and extent of such occupancy, and the improvements thereon, and whether the land was mineral or non-mineral in character, which hearing was commenced before said local officers on the 26th of November, 1878; that upon such hearing both parties submitted their testimony, after which, on the 20th day of Jan-

uary, 1879, said local officers decided, in substance, that the said land was valuable for minerals, but had been appropriated for town-site purposes prior to any appropriation by the appellees, and that the land should be awarded to the occupants of said Central City town-site, including the appellants, subject to the right of the appellees to mine and extract the gold therefrom, if in so doing, they did not materially interfere with the possession, buildings and improvements of said town occupants, including the appellants; that both the said town-occupants and the said appellees were satisfied with said decision, and no appeal was taken therefrom by either party.

On the contrary, an appeal therefrom was especially waived by both parties; that thereafter, in the absence of any appeal, and notwithstanding said waiver, and on the 6th of October, 1879, the said commissioner reviewed said decision, and decided that said town-site claimants and occupants, including these appellants, had no right whatever to the land, upon the sole ground that it was mineral, and therefore not subject to appropriation except under the mineral law of 1872, and that the said lot of the appellants, with their improvements, was the property of the appellees.

That at said hearing before the local office, and in the review by the Commissioner there was no dispute as to the fact that the said town-site claimants and occupants were the first appropriators of the land, and that appellants, and those through whom they claim had acquired an interest in, and occupied and used the premises in controversy in this case for the purposes of a town-site, prior to any appropriation upon the part of the appellees.

Yet, notwithstanding these undisputed facts, the said commissioner decided that the fact of such prior appropriation as aforesaid gave no rights to the inhabitants or occupants of said town-site, including the appellants.

That said decision was based upon the sole ground that the the land was mineral in character, and therefore no recognition or protection could be afforded under any law to the rights or claims of said town-site occupants, including these appellants, in or to the said lots or improvements thereon, or any part thereof, but that they were the property of the appellees, the placer mining claimants, as aforesaid.

Whereupon said Commissioner immediately dismissed said protest and wrongfully and illegally directed a patent to issue to appellees for said lands, as mineral lot No. 40, without any excep-

tion or reservation therein to protect the possession and improvements of the appellants and their grantors, or any of said town occupants, which patent was thereafter, on March 22d, 1880, issued accordingly.

And appellants, offering to pay their proportion of the legal expenses in procuring the patent from the United States, demand that, as to said disputed property, the appellees shall be declared their trustees, and compelled to convey the title which they have thus wrongfully acquired.

As a further defense and counter claim, the appellants, in their answer, set up further facts to entitle them to the benefit of the Local Betterment act, alleging the making of permanent improvements on said lot by them and by the person under whom they claim, while they were holding under color of title adversely to the claim of the plaintiff in good faith, and demanding, in case the title shall not come to them, that they be allowed the value of such improvements.

The Betterment act of this Territory contains these provisions:

Sec. 641 of the Code of Civil Proceedure, and following: "In "an action for the recovery of real property, upon which perma-"nent improvements have been made by the defendant, or those "under whom he claims, holding under color of title adversely "to the claim of the plaintiff, in good faith, the value of such im-"provements must be allowed as a counter-claim by such de-"fendant.

"The counter-claim in such action must set forth, among other "things, the value of the land aside from the improvements "thereon, and also, as accurately as practicable, the improvements "upon the land, and the value thereof. Issues may be joined and "tried as in other actions, and the value of the land, aside from "the value of the improvements thereon, and the separate value "of the improvements must be specifically found by the verdict "of the Jury, the report of the Referee, or the finding of the "Court. The judgment of the court upon such finding, if in "favor of the plaintiff, for the recovery of the real property, and "in favor of the defendant for the counter-claim, shall require "such defendant to pay to the plaintiff the value of the land, as "determined by such finding, and the damages, if any, recovered "for withholding the same, and for waste committed upon such "land by the defendant, within sixty days from the rendition of "such judgment, and in default of such payment by the defend-"ant, that the plaintiff shall pay to the defendant the value of "the improvements, as determined by such finding, less the "amount of any damages so recovered by plaintiff for with-"holding the property, and for any waste committed upon such

"deposit in the office of the Clerk of the Court in which such "action is pending, no execution, or other process shall issue in "such action to dispossess such defendant, his heirs, or assigns."

I quote in this connection the Act of Congress of June 1st 1874, 18 U. S. Statutes at Large, page 50, entitled: "An act for "the benefit of occupying Claimants."—

"Be it enacted, etc., That when an occupant of land, having "color of title, in good faith has made valuable improvements "thereon, and is, in the proper action, found not to be the right-"ful owner thereof, such occupant shall be entitled in the Federal "Courts to all the rights and remedies, and, upon instituting the "proper proceedings, to such relief as may be given or secured to "him by the Statute of the State or Territory where the land lies, "although the title of the plaintiff in the action may have been "granted by the United States after said improvements were so "made."

I will first ask consideration of the questions involved in the first counter-claim in the answer.

It seems to the Appellants that the proposition is nakedly and squarely presented.

Can the public, unoccupied mineral lands be appropriated for town-site purposes, and a title thereto be acquired under the laws of Congress, relating to town-sites upon public lands? If so, then it seems clear that a case is presented by this answer, entitling these Appellants and others like situated, to maintain their possession, and occupancy as town-site claimants.

Priority of legal appropriation is the recognized rule governing the acquirement of title to the public lands under the mineral, the town-site, the homestead, and the pre-emption laws. That these Appellants, and their grantors, were the prior appropriators is admitted by the demurrer.

If they could legally appropriate this land for town-site purposes, they have done so.

These lands have been selected, used, occupied and appropriated for town-site purposes long prior to any inception of title by the mineral locators. The town-site occupants have done all within their power which could reasonably be asked of them, to indicate such appropriation.

There can be nothing in the argument worthy of consideration, that the Judge of probate—who, in this territory, is the County Judge—did not proceed to make entry, or to take steps in that direction. The law of Congress does not limit the time within which application to enter shall be made by the County Judge up to the time when the land is offered for sale. If the

occupants choose to rely upon their possessory rights, they are as fully protected in the right of possession by the law as though they had a patent title, at least until the local rules and regulations create a limitatation.

In this instance the action and decision of the Land Department absolutely precluded any act by the Probate Judge toward acquiring a title on behalf of, and as trustee for, the occupants when the Department decided that these lands were not subject to entry as town-sites, but only under the mineral land laws, without any reservation. So far as the Probate Judge was concerned that was the end of it; and when the patent title was issued to the claimant under the mineral land laws, if the occupants were entitled to have the title come to them through the Probate Judge, they were also entitled to a conveyance from the party who had illegally thrust himself in the way, and obtained the title in himself.

The Sections upon this Subject are Nos. 2387 and 2388 of the U. S. Revised Statutes. They are as follows:—

"Whenever any portion of the public lands have been, or "may be settled upon, and occupied as a townsite, not subject to "entry under the Agricultural Pre-emption laws, it is lawful, in "case said town be incorporated, for the corporate authorities "thereof, and if not incorporated, for the Judge of the County "Court, for the County in which such town is situated, to enter at "the proper Land Office, and at the mininum price, the lands so "settled and occupied, in trust for the several use and benefit of "the occupants thereof, according to their respective interests; the "execution of which trust, as to the disposal of the lots in such "town and the proceeds of the sale thereof, to be conducted under "such regulations as may be prescribed by the legislative author-"ity of the State or Territory in which the same may be situ-"ated."

Sec. 2388:—"The entry of the land provided for in the pre-"ceding section, shall be made, or a declaratory statement of the "purpose of the inhabitants to enter it as a town-site shall be "filed with the Register of the proper Land Office prior to the "commencement of the public sale of the body of land in which "it is included; and the entry, or declaratory statement, shall in-"clude only such land as is actually occupied by the town, and the "title to which is in the United States. * * * * *

The only limit in point of time seems to be that such entry, or a declaratory statement of the purpose, shall be made or filed at any time prior to the commencement of the public sale of the body of land in which the town-site is situated.

The facts plead show a decision favorable to the town-site

occupants in the first instance, a reversal without appeal, a hearing solely with reference to the mineral character of the land, a decision that the character of the land was such that no application to enter it as a town-site would or could be entertained, though there were no adverse claimants; therefore an application to enter by the Probate Judge would have been futile.

It seems to the appellants also that the same facts are a perfect answer to the proposition, if one shall be urged, that no adverse proceedings and action in court were had to determine the rights of the parties, for the very course taken by the Land Department precluded such proceedings to be had.

Beside, the appellants submit that there is no provision of law by which a controversy such as this is, between prior town-site occupants and subsequent mineral claimants can be determined in the courts in the first instance, or until the proceedings shall have run through the department having jurisdiction over the government lands, and a decision by such department, after all the facts are admitted, contrary to law, or obtained through some fraud entering into the proceedings such as will justify the interposition of a Court of Equity.

Section 2326 of the U. S. Revised Statutes contemplate only a controversy between two persons claiming the same land under the same right, to-wit, under the mineral land laws. All the machinery which that section affords, its terms, and the judgment which it provides for, unmistakably limit those proceedings to such cases.

For instance:—Among the provisions contained in that section are these:—

"After such judgment shall have been rendered," (that is, the judgment upon the right of possession,) "the party entitled to "the possession of the claim, or any portion thereof, may, without "giving further notice, file a certified copy of the judgment roll "with the Register of the Land Office, together with the certificate "of the Surveyor General that the requisite amount of labor has "been expended or improvements made thereon, and the descrip-"tion required in other cases, and shall pay to the Receiver five "dollars per acre for his claim, together with the proper fees, "whereupon the whole proceedings and the judgment roll shall "be certified by the Register to the Commissioner of the General "Land Office, and a patent shall issue thereon for the claim, or "such portion thereof as the applicant shall appear, from the de-"cision of the court, to rightly possess."

The claim here spoken of is a mining claim. It is of mining claims that the section and the chapter and the act is treating

These proceedings subsequent to the judgment are proceedings proper and necessary to be taken in perfecting title to a mining claim. The price per acre fixed is for a quartz mining claim, and nothing of the kind is necessary or proper in town-site entries. The town-site act requires no amount of expenditures for improvements, provides for no mode of ascertaining their value. The Surveyor General has no act to perform regarding such improvements. The only question in such cases is, what is the number of inhabitants? And that number being ascertained, the law fixes the quantity of land within which limit an entry may be made.

Then, if we are right in our conclusion that no further steps were necessary by the town-site occupants under the circumstances, as plead in this case, to enable them to maintain their possession, and to subsequently acquire a title from the government, the proposition now before the court is simply whether it is possible, under any circumstances, to acquire title to mineral lands under the town-site act.

This leads us to an examination of the laws of Congress relating thereto. The Land Department has held in these cases that it was not possible. The decision of the Commissioner was that the lands, being mineral lands, notwithstanding the fact of the prior appropriation by the town-site claimants and occupants, as a conclusion of law, they must be awarded to the subsequent mineral claimants; and they were so awarded.

If that decision was right, the judgment in this case upon the first counter-claim is right, and should be affirmed. If it was erroneous, then this judgment should be reversed, and the appellees held to be trustees of the title for the appellants.

The history of the laws relating to the disposal of the public lands shows that so far as agricultural entries are concerned, Congress expressed a clear intent to reserve from such entries all lands which possessed the character of mineral lands, that is, all lands which were valuable for minerals.

It has been undoubtedly the settled policy of the Government to reserve from all grants of land, either to private individuals, corporations or to public bodies and states, lands containing the valuable minerals, and until quite recently no provision for pass-

ing the title from the United States to such lands was made by any act of Congress. Whatever was done in the way of extracting the precious metals was done by the sufferance rather than the express permission of Congress.

During all the time since the passage of the first act relating to the establishment of town-sites upon the public lands, however, there has been manifested an intent on the part of Congress to permit such town-sites to be located as well upon the public mineral lands, as upon any other class of the unoccupied and unappropriated public lands.

We find that as early as March, 1863, the President was authorized to reserve from the public lands, whether surveyed or unsurveyed, town-sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population. And from time to time provision was made for the disposition of such lands as were settled upon and used for town-site purposes.

By the Act approved March 3d, 1865, the establishment of town-sites upon what are known and called mineral lands, is clearly recognized. Section 2 of that Act relates to cities or towns existing on the public lands; it provides for fixing the price of lots in such town or city, and then in the concluding provisos there are found these words:

"*Provided further* that where mineral veins are possessed, "which possession is recognized by the local authority, and to the "extent so possessed and recognized, the title to town-lots to be ac- "quired shall be subject to such recognized possession, and the "necessary use thereof. *Provided*, however, that nothing contain- "ed herein shall be so construed as to recognize any color of title "in possessor's for mining purposes as against the government of "the United States." 13 U. S. Stat. at Large, p. 529.

Now, it will be seen by that provision, that Congress must have had information of the existence of cities and towns upon the public mineral lands, and it is the vein within those mineral lands which is spoken of as being possessed and recognized by local authority and the title to the town lot to be acquired was to be subject to the locally recognized possession of such mineral vein, together with the necessary use thereof.

So it will be seen that before Congress made any provision for the disposition of the public mineral lands, it recognized the existence by necessity of towns and cities in the mining country wherein the Government still retained the title, and the title to

the mines which were then in the Government, would not pass, though disposing of the lands to Town occupants.

In the history of the Legislation upon the subject of obtaining title to Government lands through the machinery provided for a town-site settler, there seems to be but three clauses reserving from the operation of such town-site acts the mineral lands or the mines therein. One of these I have just quoted. That only excepts from the title acquired by the lot-owner, such *veins* as are in the possession of private individuals, and only the vein to the extent possessed and recognized by the local authority.

Another is found in the Act approved March 2nd, 1867, Volume 14, United States Statutes at Large, pape 541. That is an Act for the Relief of the Inhabitants of Cities and Towns upon the Public Lands. It provides the mode of making the entry of the lands, the price to be paid, and the area; excepts from its provisions military and other reservations heretofore made by the United States, and reservations for light-houses, custom-houses, mints, or for such other public purposes as the interests of the United States may require, and then provides furthur that no title shall be acquired under the provisions of this Act, to any mine of gold, silver, cinnibar, or copper.

This, no more than the preceding Acts, excepts from the provisions of such town-site laws the lands in which the precious metals may be found. A mine of gold, silver, cinnibar or copper, would not include the lands wherein such mine was situated, to any greater extent than was necessary for the extraction of those metals.

The confusion of the lands with the mines seems to have produced the difficulty with reference to this and other like cases. The existence of the mine, its development, and the extraction of the metals therefrom, are perfectly consistent with the existence of the town or city upon the lands wherein those mines are situated.

Such is the case, ordinarily, with both quartz and placer mines. It is well known, that, as a rule, that part of the placer claim which the miner operates and works is but a very limited extent. He follows what he calls his "pay streak,"—quite frequently never coming to the surface with his workings, except with his shaft or mouth of his drift, and it frequently occurs that it is just as convenient to work a placer claim upon which is situated many buildings and other improvements as it is to work a quartz claim under like circumstances. The gold is usually found on or near

bed-rock. If that bed-rock is deep down below the surface he must work by means of underground workings to make it valuable in profits. If it is shallow, so that he can work it from the surface, then there is no difficulty, because the foundation of the improvements and superstructures would necessarily go to the bed-rock, and in his workings he need not necessarily injure or destroy any of such superstructures.

I am speaking of these things for the purpose of removing any impression which may be made by an assertion that it would be impossible for a town to be located upon public mineral lands without preventing the extraction of minerals therefrom.

Evidently, thus far, as we have seen, Congress contemplated the location of towns and cities upon the public lands which contain minerals. They have provided for the sale and transfer of such lands, but excluding from such sales and transfer, in the first place, all those veins of mineral which were in possession of other parties under local recognition, and in the second act excluding all veins or mines of gold, silver, cinnibar, or copper, whether in or out of possession of other parties.

The next provision to which I ask attention is found in Chapter 53 of the Act approved June 8th, 1868; volume 15 U. S. Statutes at Large, page 67. This section reads as follows:—

"That the inhabitants of any town located on the public "land of the United States may avail themselves, if the town au- "thorities elect so to do, of the provisions of the Act of March 2d, "1867, entitled 'An Act for the Relief of the Inhabitants of Cities "and Towns Upon the Public Lands,' *Provided*, this Act shall not "prevent the issuance of patents to persons who have made, or "may make, entries, and elect to proceed under existing laws; "and *provided further* that no title under said Act of March 2d, "1867, shall be acquired to any valid mining claim or possession "held under the existing laws of Congress. *Provided also*, That in "addition to the minimum price of the lands included in any town- "site entered under the provisions of this Act, and the Act for "the Relief of the Inhabitants of Cities and Towns Upon the Pub- "lic Land, approved March 2d, 1867, there shall be paid by the "parties availing themselves of the provisions of said acts, all costs "of surveying and platting any such town-site, and the expenses "incident thereto incurred by the United States, before any patent "shall issue therefor."

It will be observed that this only excludes from the title which may be acquired under the town-site act, such valid mining claims or possessions as are held under existing laws.

Of course that is a continuing statute, and no doubt the

proper interpretation of it is to say that it means such valid mining claims or possessions as may be held under existing laws in force at the time of the town-site selection.

This is the first instance, so far as appellants' counsel have been able to discover, where any exception or reservation of the mineral *lands* is made in any town-site act. Mines and veins are excluded by the other provisions to which attention has been directed, but in this instance it is evidently, of course, not only the *mine*, or the *vein*, but it is the *land* that is intended to be excluded.

But what land? Not the public unoccupied land, but a valid mining *claim or possession* held under existing laws. That is, such claims as have priority in point of time of appropriation to the selection and settlement of the town-site.

Rather than this being a reservation which would impliedly preclude town-site settlements upon the public mineral lands, it is a clear implication that Congress intended town-sites to be located upon mineral lands, excluding, by the adoption of the rule of prior appropriation, from selection for such purposes, the lands or claims which the miner holds under existing laws, having complied therewith, so as to entitle him to the right of possession.

I wish to direct the attention of the Court to the difference in the provisions for the sale by the government of the public lands between those which authorize their purchase under the pre-emption and homestead laws, and those which authorize their purchase under the town-site acts. And in this connection I may say that in all grants of the public land, and in all provisions authorizing their sale and purchase, except in the town-site acts, and in the mineral land laws themselves, either expressly or by necessary implication, and we may also say, by the settled policy of the Government, mineral lands are excluded.

Not so in the town-site acts. Congress seems to have recognized that necessarily large centers of population and business would accumulate in a mining country, and made no such unwise and unjust provisions of law as would put the business interests and business property at the mercy alone of the mineral claimant.

It was and is well known that, like the cases under consideration, which involve the town of Central City and the City of Deadwood,—localities within about two miles of each other,—that population and business would precede the possibility of obtaining titles under the mineral land laws.

The necessities of a mining population bring concentration of people; business must be conducted, structures for business must be erected, dwellings must be provided. Certainly if the law be such that only the miner may acquire title to mineral lands, and it can be acquired only under the mineral land laws, other people are trespassers. If centers of population can not lawfully exist in a mining country where all the lands are public lands, because no one can acquire the right of possession or the title except under the mineral land laws, then, I repeat, necessarily all but the miner and prospector are trespassers.

The miner is authorized to occupy and possess the mineral lands for a definite purpose:—to explore them and extract the minerals therefrom. The object and purpose of the privilege given to him of acquiring the title, and of retaining, under the local laws, the possession, is to extract the precious metals,—not to enable him to lay out his mining claim into lots, blocks, streets and alleys, and speculate upon the value of the surface right.

This case and the next one throw a lurid light upon the unjust effect which the construction of the Town-site Act contended for by the Appellees, would have. Here are large centers of population. As the records show, in both the towns, situated very close together, there were some six thousand population. Most of this population existed there, as the answers also show, before any claim to the ground was made as mineral, and presumably before any discovery of minerals in paying quantities was made,—at least within the limits of the land in controversy.

Such an aggregation of population had necessarily induced the erection of hundreds of houses and business blocks. Many thousands of dollars have been expended in structures for the purposes of business, trade and inhabitancy. The miner claims to have discovered some gold in the ground, claims the land under the mineral land laws, in form or in fact performs the acts necessary to make a location, proceeds under the mineral land law to obtain a title, and he, and the inhabitants of those towns are advised by this decision of the Department that all the buildings, the business blocks, the hotels, the public buildings, the dwellings, and improvements of all kinds and character, are, by virtue of the law, the property of this subsequent mining appropriator; and thus a mining claim, perhaps of trifling value, all the precious metals in which could be extracted in one season with the work daily of three men, is turned into wealth amounting to millions. Such

cannot, it seems to us, be the construction which the courts will put upon this town-site act.

If it is urged that the construction contended for by the Appellees is in the interest of the Government, for the reason that agricultural lands may be purchased at the rate of a dollar and a quarter, an acre, while placer ground is sold at two dollars and a half per acre, and quartz ground at five dollars per acre, the answer to that is that the law is ample to exact from the town-site occupant more even than the highest price charged for mineral lands.

But let me now revert to the difference in the language of the Acts authorizing pre-emption and homestead settlements, and those relating to town-sites.

The pre-emption Act provides that the following classes of lands, unless otherwise especially provided for by law, shall not be subject to the right of pre-emption, to-wit:— * * * * Lands included within the limits of any incorporated town, or selected as the site of a city or town; lands actually settled and occupied for purposes of trade and business, and not for agriculture; *lands* on which are situated any known salines, or mines.

Thus for purposes of pre-emption, lands selected or settled upon for the purpose of trade and business, are put upon the same footing as lands in which are situated mines, and it is the *lands* in which are situated mines that are reserved from the operation of the pre-emption law.

Again: In the homestead law, the prohibition is, "Nor shall "any mineral *lands* be liable to entry and settlement" under its provisions.

Now, with reference to the selection and sale of town-sites on the public lands, as we have seen by the act heretofore quoted, of March, 1865, which is Section 2386 of the Revised Statutes, it is the mineral *veins*, where possessed under the recognition of local authority, and to the extent so possessed and recognized, that are excluded.

And again, by the Act of March 2, 1867, it is the mine of gold, silver, cinnibar or copper, that is excluded. By the Act of June 8, 1868, it is the valid mining claim or possession held under existing laws that is spoken of.

In other words, so far as the *claim* or *land* is concerned, it is that land which under the doctrine of prior valid appropriation, shall be secured to the prior appropriator, and not taken by the

Is it not significant that, while under all the provisions of law for disposing of the public lands, whether by grant, or through the pre-emption or homestead laws, the lands in which are contained valuable minerals are excluded from their operation, while under the Town-site Acts it is only the *vein*, the *mine*, the precious metals, and such valid mining claims as exist by virtue of the law. In other words, in addition to the mine or vein are excluded only such *lands* as have been already appropriated.

As a further illustration, let us group all these acts which have come into the Revised Statutes as sections 2386 and 2392.

That which comes as section 2386, as I have before shown, is taken from chapter 107, volume 13, page 529 of the U. S. Statutes at Large. That act purported to be An Act Supplemental to an Act for the Disposal of Coal Lands and Town Property on the Public Domain, section 2 applying to cities and towns existing on the public lands. In that section the proviso reads that where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof. There is no other exclusion in that section.

The first statute from whence came the first clause in section 2392 is Chapter 177, Volume 14, page 541, U. S. Statutes at Large. That is An Act for the Relief of the Inhabitants of Cities and Towns upon the Public Lands, providing that whenever any portion of the public lands of the United States has been or shall be settled upon and occupied as a town-site, whether such selected and occupied lands are or are not surveyed, they may be entered; and the concluding proviso is this:—

"And *Provided, further*, That no title shall be acquired under "the provisions of this act to any mine of gold, silver, cinnabar or "copper."

The concluding clause in section 2392 of the Revised Statutes is taken from Chapter 53, Volume 15, page 67, U. S. Statutes at Large, and extends the provisos of the former act of March 2, 1867, to the inhabitants of any town located upon the public lands of the United States, and amends that act regarding the subject now under consideration, by adding these words:—

"*Provided, further*, That no title under said act of March 2, "1867, shall be acquired to any valid mining claim or possession "held under the existing laws of Congress."

If Congress intended to exclude cities and towns from the public mineral lands, why incorporate such a provision? If towns

and cities can not be located, under the law, upon any mineral lands, whether such lands were claimed or unclaimed, would be unimportant.

Putting the proposition in another form:—These are all the provisions relating to the effect of the selection and location of cities and towns upon the public mineral lands. And if, as the judgment in this case affirms, mineral lands can not lawfully be located upon, the mineral lands unclaimed and mineral lands claimed would be both included.

At the time of the passage of that act in 1868, as well as that of 1867, the laws of Congress did recognize an appropriation, by qualified persons, and with a limit fixed either by Congress, or the local law, of the public lands by the prospector and the miner. The right of possession, so long as the appropriation was maintained by a compliance with the laws governing the possession, was recognized by Congressional law.

All mines were, by the former enactments, excluded from sale under the town-site acts, and this act of 1868 was evidently for the purpose of avoiding any question as to the right of the miner to maintain his possession against the town-site claimant when his possession was prior in point of time to that of the town-site claimant.

It is sometimes urged that the policy of the Government is against the sale of any mineral lands except under and by virtue of the mineral land laws, or where in express terms such sale is authorized.

Is that policy any more apparent than the one encouraging the settlement in aggregations of people upon the public lands? Is such a policy to be invoked when its operation would be so destructive to equity and good conscience, as it would be if successfully invoked in these cases?

If the rule is one of iron rigidity, as claimed and enforced in these cases, that under no circumstances could the title to mineral lands be acquired under the town-site laws, then we can well conceive of a case quite parallel with these under discussion, where a discovery of valuable deposits of gold and silver brings into proximity to such discoveries large centers of population, where cities are built by the inhabitants and by subsequent discovery of the existence of gold in the lands where the cities are built, the discoverer may be able under such construction of the laws to gather

to himself wealth almost beyond his comprehension, by the simple expenditure of labor in improving his claim to the extent of five hundred dollars, and the payment to the government of two dollars and a half an acre.

There is sound reason for excluding mineral lands from the operation of the homestead and pre-emption laws and like enactments. As a rule, such lands are totally unfit for agricultural purposes. Other reasons therefor I will not stop to suggest; but convenience and necessity frequently require the existence of towns and cities upon such lands.

When the precious metals that exist in the lands are reserved from the sale to the town-site claimant, with whatever facilities are necessary for their extraction, the policy of the Government, from whatever source derived, is fulfilled.

I am not urging any violation of the rights of the prior appropriator of public lands, with a view of taking advantage of the privilege to purchase. On the contrary, I am insisting upon the enforcement of that rule. The right to the precious metals, and to the possession of such portions of the lands in which they are enclosed as the law now recognizes as his necessity or convenience in extracting such precious metals, is conceded to be as perfect, but no more perfect, than the right of the town-site claimant to the possession of the lands and property situated thereon; and he who first makes a valid appropriation thereof,—that is, of the lands,—and is thus prior in point of time, is prior in point of right, and no other rule can with safety be adopted.

I concede that the town-site claimant takes his land without any right to the precious metals therein, and subject, under proper regulations, to have it extracted from the land which he thus acquires.

It being admitted in this case by the demurrer to the answer that these appellants were town-site occupants, that they were prior in time of appropriation, that they were lawfully there upon the public lands, and were in the actual and peaceable possession and occupancy thereof, they had thereby, so far as the lands are concerned, and the right of occupancy and possession, all that could be acquired, and with it the right thereafter to purchase and acquire the title.

If in their lot, which nowhere appears in the pleadings, there exists a mine of the valuable minerals or any gold, silver, cin-

nabar or copper, they got no right to the possession of such mine, nor can they acquire any title to it, this is conceded.

But when the appellees took the title to the land, simply because somewhere upon their surveyed claim, which included the actual possession of appellants, gold had been discovered, they took the title which the appellants had the right to acquire, and which they now in equity and good conscience are bound to convey, while this judgment which we are seeking to reverse holds that the later comer took not only the precious metals, but the land and the superstructures thereon, to the erection of which tney contributed nothing.

The adjudicated cases give us but little light upon this question. It is one dependent wholly upon the construction which shall be given to the town-site acts.

As has been seen, the Land Department has not been consistent in its views, and this Court is called upon to determine which of the decisions by that Department is the correct one.

The case of Steele vs. The Smelting Company, 106 U. S., 447, and cases there cited contain about all the law upon this subject with which the Courts have favored us.

The Appellants are not disposed, if they could, to question the soundness of these rules there having recognition and so clear announcement—indeed that case seems to us to recognize the lawful occupancy of the public mineral lands for town-sites, and when actually occupied for such purpose, and to the extent so occupied, that they are not open to exploration, location and sale. While not decided by the Court, because not in that case, the fact of occupancy seems there to be assumed as one which would preclude the location and sale for mining purposes.

We do not claim here that within the limits of a town-site on the public domain, the prospector may not go anywhere upon the unoccupied portion thereof, and if he discovers the precious metals therein, locate and purchase such unoccupied portion thereof under the mineral land laws, to the extent of the limit of a legal claim. We admit an equality in the right to occupy and purchase, under both the Mineral and Townsite Enactments, with no limit upon the mineral locator to take the metals, but with a condition upon the town-site claimant that he may not acquire title to any vein or mine therein. What

we complain of in these Cases is that the miner has not only been permitted to acquire title to the unoccupied parts and the mines therein, but by virtue of his discovery therein, he has, in "one fell swoop" taken our occupied part, valuable improvements and all.

Please bear in mind that these Appellants were in the actual occupation of this lot, with business structures thereon, claiming the right of possession under the Town-site laws, months before the discovery of minerals therein, or the location as a mining claim. The ground is only claimed to be placer— no vein is pretended to exist there. It cannot be presumed that men went into our business houses, dwellings, hotels, yards, etc., or under them to search for gold. It does not so appear in these cases, but only in a sort of general way that "the lands were valuable for "minerals." This of course must have been based upon proof of exploration in the unoccupied portion of the town-site. By the decision of the Commissioner, the mining locator has taken not only the mine or vein if one existed, but the lands and the superstructures and all. Necessarily, to be consistent, the officers of the Land Department must have held as they did, that the lands which are valuable for minerals were not subject to lawful occupancy under the Town-site Acts, and these people, other than the prospectors, were all trespassers, and their expenditures could inure to the benefit of the first comer under the mineral land laws. The Appellants are unable to see that such a decision gains any support from Steele vs. The Smelting Company.

As before said, a quartz location may be six hundred feet in width and fifteen hundred feet in length, a placer location twenty acres in extent. It is notorious that veins in such quartz locations are usually quite narrow, occupying but an insignificant part, comparatively, of the claim, and seldom coming to the surface, except in occasional places. It is equally well known that usually in placer ground, the portion which the miner works, or his "pay streak" is quite limited and easily worked out without material injury to the superstructures on the surface. Now to hold that after a city is built on such land, the subsequent discoverer of a vein of quartz, or that the dirt on the placer contains some gold dust, may so claim and locate the surface as to *capture* the city and hold it as effectually as might the public enemy of the country wherein that city is situated, we submit gains no encouragement from any decision of this Court and we trust with confidence never will. Yet such was the effect of these—which we may term

intermediate decisions—of the Land Department. Not now, fortunately for those appealing to that tribunal, the rule.

The case of Steele v. Smelting Co. differs from these casses under consideration in most of the essential features.

First, That was an action at law. This, at the stage of the proceedings where the rights of the parties were adjudicated, was in equity.

There can be no doubt of the conclusiveness of a patent regular upon its face in an action at law.

It is equally well settled that in equity a party showing himself entitled to the title which the patentee has by wrongfully intruding himself obtained from the Government, may charge such patentee as his trustee and compel him to convey. And a mistake in the law governing the duties of the Land Department, or imposition practiced upon it through the fraud of such patentee, will enable such Court of Equity to administer this justice.

Second. So far as the case is stated, it would seem that the defendants in that case only averred the prior occupancy by virtue of the existence of the town-site anterior to the mining location, and not actual prior occupation of the particular lot or ground in controversy.

Here such prior actual occupancy is admitted.

Third. There the mistakes are those of facts, produced in some part by the perjury of witnesses. Here the facts are undisputed, but because the lands are valuable for minerals, not because any vein or mine exists on this lot, or because of any prior existing valid mining claim, the Department decides, as conclusion of law, that defendants did not have and could not acquire any right to the possession, or to have the title come to them from the Government.

If that is good law; if lands which may be valuable for the minerals which are in them, or in other words what are known by the generic term mineral lands, can not be settled upon when a part of the public domain, and occupied for town-site, and no part of said lands, then the patent is conclusive upon us in equity as well as law. If that view of the law is erroneous, then the plaintiffs have the title which belongs rightfully to us, and we should have our own.

If it shall be urged on this appeal that the pleader did not set forth in his answer that the appellants prosecuted the case to the Secretary of the Interior I answer that, while ordinarily the rule will be enforced that before a party can come into court for a remedy he must exhaust all his remedies in that tribunal specially charged by law with the conduct of the matters involved, this Court will not shut its eyes to the fact that in the other case from the same Land District, the same identical question had been presented to and decided by the highest officer then acting in the Land Department, and the rule which governs courts in their practice would apply,—that it is not necessary to vex a court by raising and presenting the same question more than once to enable a party to have that qustion reviewed by a superior tribunal.

I pass now to a consideration of the Betterment acts.

It will be seen that Congress has undertaken to extend the relief secured by this Betterment statute of the Territory, to just such a case as this. Here was an occupant of land, the title to which was granted by the United States after the improvements were made. These occupants had color of title; they had made valuable improvements thereon; their good faith was manifest; relying upon the theretofore unbroken decisions of the Land Department in favor of such town-site occupants, they had made these improvements. They had a right to rely upon those decisions, and to expect that the title in due course would come to them through the trustees provided by law.

Are they to be deprived of the benefits of this Betterment Law, simply because they knew the title was yet in the Government, and was thereafter to be granted?

Before either of these parties occupied or claimed these lands, they knew Congress had affirmed the Betterment Act of this Territory. It was in force when the Congressional Enactment was passed, and one who takes title from the United States takes it with that Act of Congress staring him in the face.

Congress had the right to engraft this statute upon the law relating to the disposal of the mineral lands or other lands, and when the Appellees took their title they took it upon condition that the courts would, in just such a proceeding as this, grant the occupant such relief as was secured to him by that statute.

It is true that the statute of this territory is quite liberal toward the adverse occupant of lands belonging to another, and

might in that respect where it provides for the payment of the price of the land by the occupant, be held invalid in cases where the title, before the adverse occcupation, was held by private ownership. But the public unappropriated lands belong to the Government. It may do what it will with them, and if, as we claim it has in this case, Congress makes provision that the relief secured to the occupant by the statute of Dakota, where the land lies, shall be given to him, one who purchases and takes the title to such lands from the Government, takes such title subject to such relief being granted.

It will be observed that our statute gives to the grantee the benefit of all that was done by the grantor, so if this Court shall be unable to afford relief to the Appellants, as town-site occupants, the judgment ought to be reversed, and they ought to be allowed the benefit of the Betterment Act. The provisions of that act we have quoted at length in a former part of this argument.

All of which is, with great respect, submitted.

G. C. MOODY,
COUNSEL FOR APPELLANTS.

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In the Supreme Court

Of the United States.

October Term, 1885.

No. 564.

EDWARD DEFFEBACH, Appellant,

vs.

ROBERT HAWKE, Appellee.

Appeal from the Supreme Court of Dakota Territory.

BRIEF FOR APPELLEE.

ADONIRAM J. PLOWMAN,

Counsel for Appellees.

DEADWOOD, DAKOTA:
TIMES STEAM PRINTING ESTABLISHMENT.
1885.

Supreme Court of the United States.

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No. 564.

EDWARD DEFFEBACH, Appellant,

vs.

ROBERT HAWKE, Appellee.

Appeal from the Supreme Court of Dakota Territory.

Gideon C. Moody, Counsel for Appellant.
Adoniram J. Plowman, Counsel for Appellees.

STATEMENT OF THE CASE.

This is an action of ejectment brought in the District Court of the First Judicial District of Dakota Territory, held in and for the County of Lawrence.

The complaint alleges that Robert Hawke the appellee, on the 20th day of November, 1877, filed his application in the proper United States Land Office to enter certain mineral lands of the United States as placer mining claims, which application was allowed and entry made January 31st, 1878, and that the same was duly confirmed by patent from the United States January 31st, 1882. (Record pp. 1 and 2.)

To this complaint the appellant filed his answer admitting the entry of said mineral land as a placer claim; (Record p. 2, par. 6,) and that a patent was issued to appellee therefore. (Record p. 5, par. 13,) but alleging that said patent was issued under a mistake of the law by the Commissioner of the General Land Office and the Secretary of the Interior. (Record pp. 4 and 5, par. 10, 11, 12, 13 and 14.)

From the pleadings it will be seen that appellee had perfected his entry January 31st, 1878, without any adverse claim being filed in the local land office, without any contest in said local land office or in any court, and without any application of any kind, by any one, other than that of appellee, to enter said lands.

The answer further admits that the application of the Probate Judge of Lawrence County to enter the Deadwood Townsite was not made until July 29th, 1878, nearly six months after appellee had complied with the law in perfecting his entry and paying for his placer claim, and that the application of the said Probate Judge embraced the land contained in appellee's application. (Record p. 4, par 9.)

The answer further alleges (Record p. 4, par. 10) that on the 10th day of April, 1879, the Commissioner of the General Land Office at Washington, D. C., ordered a hearing to be had at the local land office at Deadwood, to determine the character of the land embraced in appellee's entry, whether the same was valuable for mineral or not, and that he refused to permit any other question of fact to be determined.

The answer does not in terms allege that said hearing was ordered upon any contest made within the time allowed by law and the rules and regulations of the land department, but it does allege the time the application of the townsite claimants was filed, and we there-

fore know as a legal conclusion from the allegations of the answer, that such hearing was upon a protest or upon the Commissioner's own motion, for the time for a contest had then expired. It will appear from the decision of the Commissioner, that long after appellee's entry, and when patent was about to issue to appellee, a protest was filed with the Commissioner alleging that the land was not mineral, and that the Commissioner ordered the hearing upon said protest to protect the Government if that were a fact; at least the Secretary of the Interior, in reviewing the Commissioner's decision, says that he regarded the testimony taken in regard to those claims which had been entered before the townsite application was made, the same as if it were taken on an official investigation.

In the second defense and counter-claim, appellant makes the same admissions, by reference, as are contained in the first defense, so far as the character of the land, patent, etc. are concerned.

He further alleges, that on the 28th day of February, 1877, the day of the ratification of the treaty with the Sioux Indians ceding these lands and others to the United States, one Henry B. Beaman was in possession of the piece of land in dispute herein, and that Beaman had improvements thereon, etc., and was claiming title thereto in good faith, against all persons except the United States, and claiming the right to acquire the title therefor from the United States as a town lot.(Record p. 6, par. 15.)

That thereafter, to-wit: On the 6th day of July, 1878, and while said Beaman was in peaceable and quiet possession and occupation of said premises, claiming title thereto, he sold, and by a good and sufficient deed, conveyed to appellant, who in good faith purchased the same, and has at all times occupied and possessed the same, claiming title thereto in good faith, adversely to appellee; and that before appellee acquired any title thereto, appellant in

good faith made permanent improvements upon said land, of the value of $1,300.00.

To this answer the appellee interposed a general demurrer to both counts or defenses. The case was argued, the argument lasting several days, written briefs filed, and the matter taken under advisement by the court for several weeks, but the Hon. Gideon C. Moody, judge, now counsel for appellant, declined to render a decision, returned the briefs to counsel, and left the matter until the arrival of his successor, the Hon. William E. Church. Thereupon, the case was again argued and the demurrer sustained, and counsel for appellant electing to stand upon the ruling of the Court, judgment was entered for appellee, whereupon appellant appealed to the Supreme Court of the Territory, and that Court having affirmed the judgement of the District Court, the case is brought here upon an appeal from the judgement of that Court.

BRIEF AND ARGUMENT.

We have no copy of the brief of the appellant's present counsel before us, but as it will doubtless be received before our's goes to the printer, and in as much as the counsel while upon the bench heard our oral argument, and perused, no doubt with pleasure, our written brief for several weeks, we trust he will consider it no discourtesy if we present our own case before replying to whatever argument he shall advance.

The first question raised by the demurrer to the first defense set up in appellant's answer is, whether the facts there stated are sufficient to create an eqitable title in the appellant which will enable a court of equity to decree that the legal title in appellee should be conveyed to appellant; in other words, does this defense allege such

facts that a court of equity can say that the officers of the land department made a mistake of law, whereby the legal title that should have been granted to the appellant was by such mistake, granted to the appellee?

The first defense in the answer admits that the appellee applied to enter the land in dispute as land valuable for minerals, and as a placer claim bearing gold, on the 20th day of November, 1877, aud that such application was allowed and a regular entry of the land made January 31st, 1878, and that said entry was fully confirmed by regular patent from the United States, dated January 31st, 1882.

Having admitted that the said land was valuable for minerals, have admitted that appellee entered said land and obtained such patent without fraud, it follows as a matter of law that all the acts required by the laws of the United States, of the Territory of Dakota, and the local rules and regulations of the mining district in which such land was situated, were fully complied with by the appellee before he obtained said patent. That is to say, the legal location of the land as a mining claim, the posting and recording of his location certificate; that the required amount of labor had been done upon the claim; that the locator was a citizen of the United States, or had declared his intention to become such; that the proper application to purchase had been filed in the local land office; that a plat showing the boundaries of the claim had been duly filed; that the boundaries had been properly marked with stakes or monuments; that a copy of the plat and a notice of his application were duly posted in a conspicuous place on the land; that the affidavit of two persons that such notice had been duly posted was filed; that a copy of such notice was filed; that thereupon, the Register of the local land office published notice of such application to enter for a period of sixty days in the newspaper published nearest said claim; that the certificate of the Surveyor General that $500.00 worth of work had been done upon the claim

was filed; that the affidavit of the claimant that during this sixty days publication the plat and notice were posted in a conspicuous place on the claim; that no adverse claim was filed within the sixty days, or that appellee had been adjudged the person entitled to the possession by the judgment of the local court. All these are admitted when the answer admits that appellee obtained his patent to land valuable for minerals. (Revised Stat. U. S., Sec. 2325.) All these acts having been done then by appellee, the above section of the Statutes declares that "thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." But the answer does not allege any failure of appellee to comply with said chaper before the issuance of the patent. All those questions were passed upon by the officers of the land department, and their action was final and conclusive.

Smelting Company vs. Kemp, 104 U. S. p. 640.
Moore vs. Wilkinson, 13 California, p. 478.
Johnson vs. Towsley, 13 Wall, p. 83.
Moore vs. Robbins, 96 U. S., p. 532.
Quinnby vs. Conlan, 104, U. S., p. 425.
Steele vs. Smelting Company, 106 U. S., p. 451.
Castner vs. Gunther, 6 Minn., p. 134.
Shepley vs. Cowan, Ist. Otto, p. 330.

The answer alleges that appellant was holding adversely to appellee, and yet he filed no adverse in the local land office and brought no suit in the local court, and he is now barred by the Statute, and was so barred when the Commissioner of the General Land Office gave the decision complained of. (Revised Stat. U. S. Sec. 2326 and 2325.)

A townsite is an adverse claim, and appellant so alleges when he alleges his only claim of title to be under townsite law, and that he so held adversely to appellee.

Siekles' Mining Law and Decisions, p. 302.
Shafer vs. Constans, 3rd Montana, p. 371.
Weeks on ~~Montana~~ Mineral Lands, p. 148.

It will probably be argued that a townsite can only be patented under townsite law, and this we admit, but when it is admitted that the land in controversy is valuable for minerals and a person is seeking the government title under the mining laws, then any person who desires to assert an adverse right must do so under the laws relating to mineral lands.

Mineral lands are disposed of under laws created for that purpose, and where there is no question but what the lands are mineral, the officers of the land department have no discretion, they can only part with the government title upon a compliance with the laws of the United States in relation to the disposal of mineral lands, no matter whether the applicant desires them for townsite or other purposes.

The United States did not dispose of her mineral lands at all prior to 1866, and only does so now under her mineral land laws, for the purpose of encouraging her citizens to mine and extract the precious metals; and before title can be acquired to them the locator must discover valuable mineral, he must expend money and labor in the development of his claim, and the government makes him do this before she sells him the land, in order that he shall afterwards use the land for mining purposes. She cannot compel him to do so after she grants him a patent, but she makes him develop the mine to a certain extent as one of the conditions of the grant.

The answer also alleges (Record p. 4, par. 9) that townsite entry was made nearly six months after appellee's entry, and that the townsite entry included appellee's land with other lands. No adverse was filed. Appellant had taken no steps toward securing the title from the United States until months after the United States had sold the land to appellee.

The townsite entry, so far as it embraces the land ap-

pelle had already bought from the United States, was absolutely void.

The Yosemite Valley Case, 15 Wall, p. 77.
Frisbie vs. Whitney, 9th Wall, p. 187.
Wirth vs. Branson, 98 U. S., p. 118.
Stark vs. Starr, 6th Wall, p. 402.
Simmons vs Wagner, 101 U. S., p, 261.
Carroll vs. Stafford, 3rd Howard, p. 441.
Silver Bow Mining and Milling Co. vs. Clarke, Pacific Reporter, Vol. V No. 7, Feb. 12, 1885, p. 570.

The appellant must state such facts that when proven, would show him to be entitled to a patent at the time the title passed to the appellee, he must show a superior title to that of appellee. (Steele vs. Smelting Co., 106 U. S. 451, Bohall vs. Dilla, 114 U, S. p. 46.

The only ground alleged is, that after appellee had entered and paid for this land, the officers of the land department made a mistake of law in ordering a hearing to determine whether the land was mineral, and that they erred in not allowing appellant to prove that he and his grantors were the first occupants and in the possession of the land. This Court has repeatedly held, in terms apparently strong enough to penetrate the dullest brain, that squatting on public land gives no rights unless followed up by acts in compliance with the law.

Drew vs. Valentine, Federal Reporter Vol. 18 No. 13, January 29, 1883.

Why does the law require notice to be given unless it be that parties claiming interest in public lands may appear at the local office and contest the right of persons seeking to acquire the government title? Is there any law requiring the Commissioner or Secretary, six months after entry of public land, to order a hearing for any purpose? True they may do so to protect the rights of the government, but not to protect the rights of an individual who

has stood by and seen another enter land, and made no contest until after the entry was complete.

We think that the Commissioner was not compelled to order any hearing in this case, and if he did so it was as to such facts as he desired more fully to inform himself upon, for the benefit of the United States. This seems to be the view of the Secretary of the Interior when he passed upon this case, for he says in regard to cases like this one, that he regarded it as an official investigation. The appellant had no right under any law to demand a hearing at that late day; he had slept upon his rights, if he ever had any, while appellee had done all that the law demanded he should do, and had acquired a vested right in the land before appellant had taken the first step towards securing the government title.

Suppose that the hearing was one required by some law of the United States, let us see if it were error to order a hearing to determine whether or not the land was valuable for mineral, and ignore the question of possession or prior possession. In other words, if the land be valuable for mineral, did a townsite claimant have such a superior right to it by mere prior possession and occupancy that he should now be decreed to be the owner, when he alleges that such possession was not for mining purposes but was for townsite purposes?

Section 2318 U. S. Revised Statutes declares "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." This seems to be plain language. "In ALL cases" certainly does not mean they shall be held for townsite purposes, unless some law expressly so directs. Is there any law expressly directing that a townsite may be entered upon lands valuable for minerals? Counsel should find it before he charges officers of the land department with committing an error of law in not issuing a patent for such lands to townsite claimants.

It was always the policy of the government to reserve from sale her valuable mineral lands, long before Congress declared it by statute.

The Secretary vs. McGarrahan, 9th Wall, p. 310.
Morton vs. Nebraska, 21st Wall, p, 660.
The United States vs. Gratiot, 14th Peter, p. 539.
Hiydenfeldt vs. Daney Gold and Silver Mining Company, 3rd Otto, p. 641.
Minter vs. Crommelin, 18th Howard, p. 87.
The United States vs. Gear, 3rd How,, p. 131.

The act of July 26th, 1866, was the first law by which the miner could acquire title from the United States for mineral lands. This applied to deposits or lodes etc. On July 9th, 1870, Congress enacted, that claims usually called "placer," including all forms of deposit excepting veins of quartz or other rock in place, should be subject to entry and patent under that act under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims."

16th Stat. at Large, p. 217.
Revised Stat. Sec. 2329.

This was the first and is now the only law for the sale of placer claims. Under this law appellee obtained his patent, and it being admitted by the answer that the land so patented to appellee was valuable for mineral—being a placer mining claim—it follows, as a matter of course, that Chapter 6, U. S. Revised Statutes, was the only law under which the land officers of the government could issue said patent. To determine then, whether such officers committed an error of law that deprived appellant of title to the land in dispute, we must examine said chapter six. Sec. 2319 declares that, "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase by citizens of the United States and those who have declared their intention to become

such, *under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts*, so far as the same are applicable and not inconsistent with the laws of the United States."

The answer alleges no compliance with any local rules or customs of the miners, nor a compliance with any of the provisions of said Chapter six. In other words, it alleges the land to be mineral, and that the appellant was seeking to obtain title to it under laws in relation to townsites.

Section 2322 Revised Statutes of the United States, declares that locators of mining claims, their heirs and assigns, so long as they comply with the laws of the United States, the Territorial and local regulations not in conflict with the laws of the United States, "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, etc." True, this section speaks of lodes, veins and ledges, but Section 2329, so far as entry and patent, makes it applicable to the possession of placer claims, and when appellant admits that appellee entered a placer claim and obtained patent therefor, he admits that appellee had a placer claim located in conformity to the laws of the United States, the Territory of Dakota, and the local rules of miners in the mining district, and if appellee had such a claim the law declares that he had the exclusive right of possession and enjoyment of all surface included within the lines of his location or claim.

If this be the true effect of the admissions, of what avail is it to appellant to allege prior possession, if it were mineral land it was in law free and open to the miner to explore, locate and patent, and if the appellant was in possession, but not for the purpose of locating, mining, etc., he was there as a trespasser against the United States, and his possession was unlawful, for the United States gave a license to enter and possess said land for specific purposes,

to-wit: Extracting precious metals. The lands were reserved for that purpose.

Silver Bow Mining and Milling Co., Pacific Reporter Vol. V No. 7, Feb. 12, 1885, p. 570.
Kessler vs. St. Louis Public Schools, 18th How., p. 28.
Drew vs. Valentine, Fed. Reporter vol. 18 p. 712.

Would it be contended that a pre-emptor or homesteador might go upon mineral land and acquire a possession that the miner must recognize, or that the United States must recognize? If not, what superior right has a person who merely erects a saloon, dance-house or shop upon mineral land? All lands vauable for minerals are reserved from sale except as expressly directed by law, and the law declares them to be free and open to location and purchase only upon the discovery and location of a mining claim. Townsite occupation is not authorized or directed by any law, and possession for any other than mining purposes before entry and patent are unlawful, and confer no rights against the United States or its grantee.

There can be no lawful possession, no right to become a purchaser of any lands of the United States until the party complies with the law governing the possession and sale of the particular kind of land he seeks to acquire, to-wit: To mineral lands, by compliance with the mineral land laws; homestead, by compliance with the homestead law; and pre-emption, by compliance with the pre-emption law.

The miner is not compelled to occupy his mining claim by actual residence or personal presence upon it, and it is sufficient for him to comply with the law in relation to his location and development.

Belk vs. Meagher, 104 U. S., p. 279.

In this case appellant declares the land valuable for minerals but insists that he should have been permitted to enter them under the townsite laws, because he alleges that

he was there in the prior possession of a town lot, though it does not appear that the townsite was laid out under any legal authority. If this be the law, that the mere possession of public mineral lands under a townsite claim, without entry or the taking of any steps to acquire title, shall prevent and prohibit the miner from exploring and purchasing such mineral lands, then a few individuals by rushing into a mineral district and erecting shanties under a townsite claim may divert such land to a different purpose from that declared by Chapter 6 of the Revised Statutes U. S., and the miner can make no location of mineral land except in the wilderness.

In Steele vs. The Smelting Company, 106 U. S., p. 449, this Court has said that settlement or location of a townsite upon public lands only exempts such lands from settlement and sale under the pre-emption laws of the United States, and that such land is not exempt from location and sale, when unoccupied, for mining purposes. It is contended in this case that by the term "when unoccupied" was intended by the Court to mean when unoccupied by a townsite claimant. We do not so understand this Court, for under the townsite laws of the United States, a certain number of inhabitants may enter one hundred and sixty acres, and a greater number may enter more, and under the laws of the Territory of Dakota, so much of the land embraced within the limits of a townsite as shall be unclaimed by individuals shall be vested in the school authorities.

Laws of Dakota, 1881, p. 216.

Within the meaning of the townsite law all land within the townsite limits is occupied by the inhabitants, and the occupation is one of the requirements necessary to secure title. Section 2387, Revised Statutes U. S. Hence it seems to us that the language of this Court in the above case meant when unoccupied by another for mining purposes; also when the Court says: "Whenever, therefore, mines

are found in lands belonging to the United States, whether within or without townsites, they may be claimed and worked, providing existing rights of others from prior occupation are not interfered with; whether there are rights thus interfered with, which should preclude the location of the miner and the issuance of the patent to him or to his successor in interest, is when not subjected under the law of Congress to the local tribunals a matter properly cognizable by the land department when application is made to it for a patent; and the inquiry thus presented must necessarily involve a consideration of the character of the land to which title is sought, whether it be mineral, for which a patent may issue, or agricultural, for which a patent should be withheld, and also as to citizenship.

Under this decision the appellee had a right to locate his mining claim, and we claim there is nothing in the answer to show that it would interfere with the prior rights of others; for the allegations of the answer are, that the land was mineral. He knew the title to it was yet in the United States. He was bound to know the law; that the United States had reserved that land for mining purposes, and that title could only be acquired by a full and complete compliance with the mineral laws of the United States; yet he went upon it, insisting that because he wanted it for a town lot the whole policy of the Government and her mineral land laws should be wiped out of existence. so to speak, in order that he might acquire title to a town lot. By thus going upon such lands knowingly and willfully he acquired no right whatever.

Drew vs. Valentine 18 Fed. Reporter p. 712.

Again, the case of Steele vs. The Smelting Company, seems to settle the one now at the bar of this Court, for the appellant did not apply to the local Courts to determine whether he had any prior rights that would be interfered with by the appellee when appellee applied for his patent, but appellant waived that right. He took no steps until

after appellee's entry, and then only protested to the land department, months after appellee's entry.

The Commissioner's order for a hearing was not made until April 10th, 1879; all this time appellee had a vested interest in this land. In the case quoted, this Court has said that it was a matter properly cognizable by the land department to determine whether a miner's location within the limits of a townsite interfered with the existing rights of others, and that the judgement of that department was binding and conclusive. In this case the appellant alleges that he appealed to that department, to the very head of the department, that he had proved his prior possession, and that that department decided and determined that he had no rights in this land with which appellee had interfered. And we say now that the action was conclusive and binding; it decided that even if appellant were in the prior possession of this particular piece of land in dispute it gave him no rights as against the Government of the United States, nor against this appellee its grantee. He alleges that in the controversy before the land department, that department made a mistake of law, but the facts he states are not sufficient to establish such a mistake of law. Suppose he were in prior possession of the land in dispute, that of itself would be a question of fact and not of law. Prior possession *for townsite purposes* is another question of fact, and in deciding that prior possession *for townsite purposes* conferred no rights upon appellant there could be no mistake of law, when the facts showed that appellant had not taken all the steps necessary to acquire title from the United States under the townsite laws, and one of the necessary facts in such case would be that the land sought to be entered was of the class subject to townsite entry. When the appellant admits the land to be mineral land, a placer mining claim, he admits that it was land to which no title under the townsite laws could be acquired; that if he were in possession for townsite purposes he was a trespasser, and it would be immaterial

whether such possession was prior or subsequent to that of appellee, for the only possession and occupation permitted by law was that of exploring and discovering minerals, locating and purchasing the land

We have discussed this question as though all the allegations were true, under the rule that the demurrer confesses them to be so, but we regret that the pleadings were not all verified so that the answer should have contained the real facts as they were proven and found by the commissioner of the General Land Office and Secretary of the Interior, and inasmuch as the decisions of these officers are alleged to contain the error which should take our title away from us and convey it to the appellant; and inasmuch as their answer especially referred to them, to that extent we consider them in this case, and for the convenience of the Court will print and attach them to this brief. It will there be seen that the Secretary did consider the question of prior possession by appellant, and expressed his opinion upon it.

The next question is whether a townsite may be entered upon land of the United States known to contain valuable minerals. We have already referred to the policy of the government, and to the statute reserving such lands from sale, unless otherwise expressly directed by law. This, we understand, counsel for appellant will admit, but it was argued, in the court below, that somewhere in the townsite laws there was an implication that townsites might be located upon lands valuable for minerals. Let us examine the townsite legislation of Congress. The first act seems to have been that of May 23d, 1844; the next March 3d, 1863, Statutes at large, p. 743. This is an act empowering the President to reserve townsites for certain purposes, and it provides means for disposing of lots therein.

The next was the act of July 1st, 1864; 13th, Statutes at Large, p. 343. This repealed the act of 1844. The first section provides that tracts of the public domain con-

taining coal beds, which lands had been excluded from the operation of the pre-emptiom law of 1841, as "mines," might be sold by the President. Section 2, relative to townsites on the public domain, provided that the President might order lots in such towns sold at public auction, to the highest bidder, subject to a minimum of ten dollars for each lot, or at such price as the Secretary of the Interior might order, and that the act should be given effect under regulations provided by the Secretary of the Interior. This is now found in section 2382, Revised Statutes.

The next act is the act of March 3d, 1865. 13th Statutes at Large, p. 530; an act supplemental to the act of 1864. This act is also in relation to coal lands and townsites, and section 2 contains this proviso: "That where mineral veins are possessed, which possession is recognized by the local authorities, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession, and the necessary use thereof; provided, however, that nothing contained herein shall be so construed as to recognize any color of title in the possessor for mining purposes, as against the government of the United States." Now sec. 2386, Revised Stat.

This is the law upon which former counsel for appellant relied for the implication that townsites are premitted on mineral lands. True, the orignal act that contained this section has been repealed, but the courts will look at a repealed statute to ascertain the legislative intent and meaning when a portion of the act has been preserved and carried into the revision of the statutes.

Ex parte Crow Dog, 109 U. S., 556.

Under that act, when it was in force, by the direction of the President, the Secretary of the Interior could sell town lots in towsites laid out upon public lands, at a minimum of $10, the sale to be by public auction; but at that time there was no law of the United States by which

title, excepting to coal lands, could be acquired to the mineral lands of the United States. The mining statute of July 26th, 1866, had not yet been passed; the policy of the government was still to reserve from sale her mineral lands, and this proviso was put into the townsite law of 1865, in order that when the Secretary of the Interior sold a town lot at auction, if it contained mineral, the purchaser would get no title to it, and that thereby the United States would in no manner sell her mineral lands. The first proviso related to the working and possession of veins by miners, for by general license the government at that time permitted people to go upon her mineral lands and extract the minerals therefrom. She would give them no title, but she would not interfere with their possession, and so the first proviso was made to recognize that policy of the government, and she provided that when one of these townsites should be laid out, if it should be discovered that a lot therein was overlying a vein that was then possessed and worked by some miner, that by selling the lot the United States did not intend to stop his work nor to interfere with his possession. And then, with still greater caution, fearing, perhaps, that by the proviso protecting his possession of a vein in a town lot the miner might claim that he was there under color of title, the further proviso was inserted that it was not intended to recognize any color of title in the miner by his mere possession. But after the year 1866, when the United States provided a method by which the miner could purchase his mining claim, the last proviso—now law by sec. 2386—had no meaning or application to the miner acquiring title under the act of 1866, for sec. 2322 of the Revised Statutes, not only gives him color of title, but gives him exclusive possession, without purchase, upon proper location of his mining claim, etc.

It also seems apparent, when we look at sec. 2386 in the original act, that it was only intended to apply to town lots sold at public auction by order of the President, un-

der regulations by the Secretary of the Interior; that part of the act of July 1st, 1864, as we stated above, is now found in sec. 2382 of the Revised Statutes, and if the proviso in the act of 1864 were then a limitation upon the sale of lots by the Secretary of the Interior, it seems equally true now, that the same proviso, (now sec. 2386 of the Revised Statutes) applies to the same kind of sale which is authorized by sec. 2387. At the time sec. 2386 was enacted by Congress, there was no provision of law by which the county judge or corporate authorities of a town laid out upon the public domain could enter the land embraced within its limits as a townsite. How then, in 1865, could it be argued that sec. 2386 applied to a lot, in a townsite entered by a probate Judge, and to a mining location in such a town?

The next act was that of March 2d, 1867, 14th Statutes at Large, p. 541; and this is the first law that contained the provisions found in sections 2387, 2388 and 2389 of the Revised Statutes of the United States, and by which authority was given to a county judge or corporate authorities of a townsite, to enter the land within its limits for townsite purposes. Bearing in mind then, that section 2386 had been enacted two years prior to the sections of law just mentioned, it is impossible that Congress intended that section 2386 should apply to the entry made by a probate judge or corporate authorities for townsite purposes. It was, and is, a prohibition upon the President and Secretary of the Interior in the sale of town lots. They shall not part with valuable mineral lands of the United States in that way.

Again, in the act of 1867 we find this proviso: "That no title shall be acquired, under the provisions of this act, to any mine of gold, silver, cinnabar or copper," now a part of sec. 2392 of the Revised Statutes; and in the act of June 8th, 1868, 15th Statutes, p. 67, "An act to amend the act of March 2d, 1867," the proviso, "that no title under

said act of March 2d, 1867, shall be acquired to any valid mining claim, or possession held under existing laws of Congress." These two provisions now constitute sec. 2392 of the Revised Statutes. Thus upon an examination of the original act of 1867, wherein power was granted to the probate judge, or corporate authorities to enter townsites upon the public lands, Congress expressly provided that no title should be acquired under the provisions of that act to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws of Congress. If the Court were construing the act of 1867 there would be no section 2386, but there would be a positive prohibition against the probate judge or corporate authorities acquiring any title to lands valuable for minerals, for we hold the words, "mine of gold, silver, cinnabar or copper, and valid mining claim or possession," are only other words describing lands valuable for minerals. It is plain why the latter part of section 2392, was added June 8th, 1868. The statute of 1866 in relation to exploring and locating mines was then in force; the miner could hold his claim under a possessory title without applying for a patent, or he could purchase as he chose, and no doubt the language, "mining claim or possession," was added to cover such cases; it is a continuing statute; and when in 1870 authority was given to purchase claims usually called "placers;" this language was broad enough to include them. It may be that in 1868 congress intended to include placers in the terms "valid mining claim or possession," for it is a matter of history that, while the miners did not acquire title to their placer claims under the law of 1866, they did hold possession of a valid mining claim under that law and the local rules and customs adopted by miners under authority of the act of 1866.

The act of 1866 uses the word "valid mining *claim* or possession," and the act of 1870 declares that "*claims*" usually called placers, etc.

We have seen, then, that when a townsite is entered by a county judge or corporate authorities, it is entered under those provisions of the law of 1867 which have been preserved in the Revised Statutes, and that the proviso prohibiting the acquiring of any title by them under the townsite law, to mineral lands, have also been preserved in the Revised Statutes, in sec. 2392. If we construe these sections together now, as they were together when they were first enacted, there is no doubt, no contradiction, but the intent and meaning of Congress, is plain and in perfect haromony with its entire policy throughout its whole history. In the same way we should consider sec. 2386 with sec. 2382, etc, for sec. 2386 is found in the act of 1865, which was supplemental to the act of 1864 that authorized the President and Secretary to sell town lots. Section 2386 was then a limitation upon the mode of disposing of the public domain for townsite purposes. As that mode may still be applied, the limitation should still be applied to it as Congress originally intended. It will thus be seen that, instead of finding any law directing the entry of townsites upon lands valuable for minerals, we have found that Congress, when passing the several acts that now constitute our townsite law, has always in positive terms declared that title to such land cannot be acquired for townsite purposes.

Mining Company vs. The Consolidated Mining Company, 102 U. S., p. 174—167.

There are other things, small in themselves, but indicative of the same intention. Section 2388 provides that townsite entry shall be made or declaratory statement filed prior to the commencement of the public sale of the body of the land in which it is included; but mineral lands are never sold at public sale, hence, by implication, this prohibits townsites upon mineral lands.

Again, placer claims are sold at $2.50 per acre, while townsite lands are sold for $1.25 per acre. This implies

that congress did not intend to permit townsites to be located upon mineral land. Why should a miner be compelled to locate and develop his claim, expend $500 upon it, and then pay $2.50 per acre, if townsite claimants can locate the same mineral lands and acquire from 320 to 1,280 acres at $1.25 an acre without expending anything for the development of the land itself?

The policy and statutes of the United States reserve mineral lands from sale except as expressly directed by law. No express law has been found directing the sale of mineral lands for townsite purposes; on the contrary, the law, expressly prohibiting the acquisition of mineral lands for townsite purposes, is found in section 2392. We find the law provides a different method of acquiring title for mineral lands from any other class of lands owned by the government. A different price is paid for them—different acts are necessary to initiate a title.

Counsel for appellant has just handed us his brief, and we find that he lays great stress upon the necessity for towns in mining districts. There is no need to argue this question. Towns are a necessity wherever trade and commerce demand them to be; but we insist that there is no necessity and there never was a necessity to locate for townsite purposes 640 acres of the richest gold bearing placer ground within a mining district. We claim that the ground the placer miner has worked over will do as well for townsite purposes as that which has not been worked and is rich in precious metals.

To the learned counsel we would say, who makes the town necessary in a mining district: Who goes into the wilderness, climbing up the mountains, following down the streams as they wend their way through forest and canyon? Is it the saloon-keeper, the dance-house man, the butcher, the merchant, the gambler, or the speculator? Is it not the miner and prospector, who, with his pick and shovel on his back, trudges from mountain to mountain,

from gulch to gulch, until at last he discovers the precious metal hidden in some part of the public domain? It is the publicity of his discovery that draws your townsite people into the wilderness. When the news comes that "rich diggings" have been struck your merchant, your gambler, your dance-house man and your speculator rush over the trail the prospector has made. They put their shanties on his claim. They build everywhere and anywhere, and they are there for the sole purpose, by fair means or foul, of getting a share of the miner's gold. Such is the history of every mining town in every mining camp in this country. If the news of "rich diggings" proves false the town and the mining camp disappear. Like a mushroom it springs up in a day and then wilts away. When the mineral has been extracted your mining towns nearly all, sooner or later, prove to be deserted villages. It is only where the ground is rich and the mines permanent in character that your town in the mining district thrives and flourishes. The towns in a mining district do not go before, but they follow in the wake of the miner. Such was the case with Deadwood, as the officers of the land department decide in the opinions in this case. True, the miner, in 1875 and 1876, went into the Black Hills in violation of the law, and it is equally true that your townsite people followed them in violation of the law.

The miners adopted rules and regulations under the act of 1866, but they were in a place where it was unlawful for them to be. It was in an Indian reservation. Your townsite people followed them; violated the same law that the miners did. When they attempted to organize a municipal government they acted under no law and by no authority except that of might, they being in far greater numbers than the miners. As a matter of fact the miner was the first on the site of Deadwood. As a matter of fact the townsite people followed him. All were there unlawfully until the ratification of the agreement with the Sioux Indians, on the 28th of February, 1877. Then

the land was public land of the United States; but the townsite people and this appellant knew the lands were valuable for minerals. They knew that lands valuable for minerals were reserved by the laws of the United States. They were bound to know it, and did know it. In their answer they admit that knowledge. If, under such circumstances, the occupation of the mineral lands of the United States by people claiming a townsite, prevents the miner from acquiring the title thereto, then it is not necessary, as Chapter 6, of the Revised Statutes, requires, to locate a mining claim, expend $500 worth of work upon it, or to discover any mineral in it. It belongs to he who first squats upon it, whether he claims it for townsite purposes or what not. In other words, the argument advanced by counsel for appellant seems to be that prior possession of mineral lands of the United States gives to the occupant the equitable title without any attempt to comply with the mineral land laws of the United States. Such is not the law.

Drew vs. Valentine, 18 Fed. Reporter, p. 712.
Steele vs. Smelting Company, *supra*.

Again, he urges that the patent to the appellee should haqe contained a reservation in favor of the appellant. He talks mysteriously of "pay streak," of acquiring title to a city at "one fell swoop," and of "capturing" a city, and urges that the surface ground is not necessary or useful to the placer miner. It is waste of time to argue that placer mining can be carried on to a profit within the limits of a populous town, where the miner shall be liable for damages done to buildings, streets, etc. He needs the entire ground, surface and all. His claim may prospect from the "grass roots down," and he often is compelled to dig away and wash all the land within his claim. It is "nonsense" to argue that he may dig under and let a store or dwelling "down to bed rock," as counsel seems to argue.

We surmise that if the dwelling of the learned counsel

were upon some placer mining claim and the miner were to drift under his dwelling and let it down gently upon the bed rock, the opinion which the learned counsel would express upon such an occasion would be much more vigorous and very contrary to that contained in his brief.

A placer claim includes all the surface within its boundaries.

Blake vs. Butte Silver Mining Company, 2d Utah, p. 54.

Abbott vs. Primeaux, 16th Nevada, p. 361.

As to the reservation appellant claims should have been inserted in our patent, it is a sufficient answer to say that the officers of the Land Department can insert no reservation in a patent not authorized by law.

Silver Bow Mining and Mil ing Company, 2 Clarke.

The second defense and counter claim set up is the claim for compensation for improvements alleged to have been put upon the land in dispute by appellant. The allegation of the answer (Record p. 6, par. 15,) is that one Henry B. Beaman was in peaceful possession and lawful occupancy of the premises, claiming to be the owner thereof; that he had a building thereon; that he was occupying and using the same as a town lot, claiming title thereto in good faith against all persons except the United States, and claiming the right to acquire the title from the United States as a town lot. The answer admits that the townsite was located on the public land; that the premises in dispute were valuable mineral lands; that appellee obtained patent thereto, etc.

It will be seen that the appellant admits that the title was in the United States, and hence Beaman had no title at all at the time of appellant's purchase; that Beaman was simply in possession, claiming a right to acquire title of the United States. The possession of mineral land, without complying with the laws of the United States,

gave him no title whatever. In paragraph 16 of the answer (Record p. 6) the appellant alleges a purchase from Beaman; that Beaman conveyed to him, by good and sufficient deed, July 6, 1878, that appellant has since occupied and possessed said premises under said deed, claiming title thereto, in good faith, adversely to appellee, and before appellee acquired any title thereto, appellant in good faith made permanent improvements upon said premises, of the value of $1,300. Thus it appears that Beaman had no title—nothing but possession. It also appears that appellant knew Beaman acknowledged the title to be in the United States, and appellant alleges that he himself only claims the right of acquiring the title of the United States; so that all their allegations taken together are but legal conclusions, and the one principal fact that appears is that appellant was in possession, claiming to acquire title of the United States, and that his right to do so was better than that of appellee's. Neither the appellant nor his grantor ever claimed the fee. They were not holding adversely to the United States, appellee's grantor, but were endeavoring to obtain that title.

It further appears that appellant did not purchase from Beaman until after appellee's entry of the land, for appellee entered the land January 31, 1878, and the appellant bought of Beaman July 6, 1878. This was after appellee had bought the land from the United States and had a vested right in it.

When appellee entered the land the law required that he should give notice of his application for a patent; that the notice should not only be published in the newspaper published nearest the claim, but it had to be posted upon the claim; and when appellant admits that the application was made he admits the posting and publication of appellee's notice, and must therefore be presumed to have full knowledge of all those facts and of other steps required of appellee to secure patent.

Appellant also knew that Beaman's improvements were not made upon the land under color of title. He alleges none, and mere occupation by appellant or his grantor, before patent issues, creates no equity.

Gibson vs. Choteau, 13th Wall., p. 100.
Wilcox vs. Jackson, 13th Peter., pp. 516 and 517.
Irvine vs. Marshall, 20th How., p. 558.
Fenn vs. Holme, 21st How., p. 481.
Lindsey vs. Miller, 6th Peter., p. 672.
Steele vs. The Smelting Company, 106 U. S., p. 456.
Henshaw vs. Bissell, 19th Wall., p. 271.
Brant vs. The Virginia Coal and Iron Company, 93d U. S., p. 327.
Drew vs. Valentine, 18 Fed. Rep., p. 712.

The allegations show that whatever steps were taken to enter the townsite were taken by the Probate Judge of Lawrence county as trustee for the inhabitants of said townsite, under sections 2387 and 2388 of the Revised Statutes.

When the title is once vested in the Probate Judge or corporate authorities the disposal of the lots and proceeds arising from the sale of lots must be had under the regulations prescribed by the laws of the territory. Section 2387, Revised Statutes of the United States, and from this answer and the facts therein alleged, nothing appears to show that, even if the title to the land in controversy had been granted by the United Stetes to the Probate Judge, that this appellant is the party entitled to receive the title. The appellant, before he can acquire a title, must comply with the laws of Dakota territory. By the laws of Dakota, 1881, p. 216, the appellant is not the proper party to set up an equitable title in this action. It should be the Probate Judge, for an express trust vests the title in the trustee and not in the beneficiary.

S. P. Ry. Company vs. Doyle, 8th Sawyer, p. 160.
Cash & Selby, Appellants, 6 Mich., 193.

The Statutes of Dakota bearing upon this defense are as follows:

Sec. 641, Code of Civil Procedure:

"In action for the recovery of real property, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title, adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a counter claim by such defendant.

Sec. 643:

"Issues may be joined and tried as in other actions, and the value of the land, aside from the value of the improvements, must be specifically found by the verdict of the jury, the report of the referee or the finding of the Court.

Sec. 644:

"The judgment of the court upon such finding, if in favor of the plaintiff for the recovery of the real property, and in favor of the defendant for the counter claim, *shall require such defendant to pay to the plaintiff the value of the land as determined by such finding*, and damages, if any recovered for withholding the same, and for waste committed upon such land by the defendant, within sixty days from the rendition of such judgment, and in default of such payment by the defendant, that the plaintiff shall pay to the defendant the value of the improvements as determined by such finding, less the amount of any damage so recovered by plaintiff for withholding the property, and for waste committed upon such land by the defendant, and until such payment or tender and deposit in the office of the clerk of the court in which said action is pending, no execution or other process shall issue in such action to dispossess such defendent, his heirs or assigns."

Section 2105 of the Civil Code of Dakota defines good faith:

"Good faith consists in an honest intention to abstain

from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious."

Sec. 2107. "Actual notice consists in express information of a fact."

Sec. 2109. "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable dilligence, is deemed to have constructive notice of the fact itself."

Do the allegations in this defense of the answer show that appellant made permanent improvements upon this land, under color of title; that is believing he had a good title to the whole of it, and did he hold it adversely to appellee in good faith? He knew Beaman did not own it and that the United States did. He knew appellee had entered it, for he alleges that he appealed from the decision of the Commissioner of the General Land Office. He knew the Probate Judge had made no entry, for he alleges the Probate Judge made the entry July 29th, 1878, after he bought from Beaman, and that such entry was made for his benefit as well as other claimants.

Instead of showing good faith, he shows that he bought the land from a man whom he knew had no title, and that he himself, through the Probate Judge, sought to acquire the title of the United States. He bought out Beaman with actual notice of appellee's rights, for appellee's notice and application were notice to all, and with such notice and knowledge appellant erects his building, hoping by that means to qualify himsely as a town claimant, and to acquire a patent to the Probate Judge in trust for himself, etc. In other words, the answer shows that appellant, after appellee entered the land, went upon the same for the purpose of contesting appellee's right to a patent, and

alleges the townsite entry and the hearing in the land department had for that purpose, and because of his failure in that undertaking he now appeals to equity.

There could be no adverse possession by appellant until the patent issned to appellee.

Vansickle vs. Haines, 7th Nevada, p. 261 and 283.
Cook et. al. vs. Foster, 2nd Gilman, (Ill.), p. 652.
Cibson vs. Chouteau, 13th Wall, p. 100, and cases cited above.
Thompson vs. Prince 67, Ill. 281.
Hughes et. al. vs. Stevens 95, Ill. 393.

The possession, to be adverse, must have been the claim to the fee, and not a right at some time to acquire the fee.

Ricard vs. Williams, 7th Wheaton, p. 59.
Smith vs. Burtis, 9th Johns, p. 180.
Howard vs. Howard, 17th Barb., p. 663.
LaFrambois vs. Jackson, 8th Cowen, p. 589.
Bay vs. Pope, 18th Cal., p. 694.
McCracken vs. San Francisco, 16th Cal., p. 636.
Love vs. Shartzer, 31st Cal., p. 495.
Bedell vs. Shaw 59, N. Y. 46,
Plympton vs. Plympton, 12 Cush. (Mass.) 458.

Defendant knowing his grantor had no title, cannot claim improvements in good faith.

Gaines vs. Kennedy, 53rd Miss., p. 107
Aurrecoecha vs SinClair, 60th Cal., p. 532.
Same, 104 U. S., p. 387.
Canal Bank vs. Hudson, 111 U. S., p. 81.

It will be seen that the law of Dakota provides that if the appellee recover, and the appellant be found entitled to improvements, the appellant shall pay the appellee the price of the land, etc. This act is void. It permits the treaspasser to deprive the owner of his land. The land the United States grants the miner that he may extract gold, the law of Dakota takes away from him for a saloon,

dance-house, butcher shop, or other use, as the claimant may see fit.

Green vs. Biddle, 8th Wheaton, p. 1.
McCoy vs. Grundy, 3rd Ohio St., p. 463.
Child vs. Shower, 18th Iowa, p. 261.
Nelson vs. Allen, 1st Yerg. (Tenn.) p. 361.
Lathrop vs. Mills, 19th Cal., pp. 531 and 536.
Collins vs. Bartlett, 44th Cal., p. 383.
Billings vs. Hall, 7th Cal., pp. 1, 10 and 14.

If it be true that a grant from the United States grants possession and enjoyment of the land, this statute interferes with the primary disposal of the soil, for appellant takes possession after appellee's entry, before his patent could issue, and says, I will keep the land, you bring ejectment, and we will pay you the price which a jury may fix. And if appellee be unable to pay for the improvements under this statute he cannot obtain possession of his land, and the grant of the United States gives him nothing, and the patent in his pocket is worthless.

This statute impairs the rights of property. It prohibits the grantee of the United States from holding private property, and it exercises the right of eminent domain for the benefit of a trespasser.

In the matter of Albany street, 11 Wend. 150.
In the matter of John and Cherry Streets, 19 Wend. 676.
Taylor vs. Porter, 4 Hill, 146.
Wanehamer vs. People, 13 N. Y., 386.
Rockwell vs, Nearing, 35 N. Y., 305.
Young vs. McKinzie, 3 Ga., 42.

The legislative assembly of Dakota Territory is prohibited by its organic act, from passing any law interfering with the primary disposal of the soil.

Revised Stat. U. S. Sec. 1851.

If appellant can purchase of one who has no title, merely an occupant, after appellee's entry and then after

patent issues have the appellee declared a trustee for him, and recover the lands under this statute, then appellee gets nothing from the United States—the law of Dakota interferes and declares that appellant by reason of his improvements may buy the land at the price a jury may fix.

Gibson vs. Chouteau, 13 Wall, 100.
Irwin vs. Marshall, 20 How. 561.
Vansickle vs Haines, 7 Nev., 261 and 283.

The act of Congress June 18th, 1874, 18 Stat. at Large, p. 50, cited by appellant's consel, does not make the "Betterment Act" of Dakota valid. That only refers to what remedies shall be enforced in Federal courts. What we are urging is first, that Dakota has no vaild "Betterment statute."

And second, of it were valid the appellant has not brought himself within it; has not shown a holding of the land adversely to plaintiff, under color of title in good faith.

To hold under color of title he must honestly believe he had the title, but he alleges he did not have and knew all the time that he did not.

Having admitted that Beaman had no title, appellant stands no better than a purchaser taking a quit claim deed, for he knew the deed conveyed no title, and hence he did not enter under color of title in good faith.

Den vs Huut, Spencer (N. J.), 493
Baker vs. Humphrey, 11 Otto, 494.
Foulke vs. Bond, 12 Vroom (N. J.), 492
May vs. LeClaire, 11 Wall. 217.
Winslow vs. Newell, 19 Vt., 164.
Oliver vs Piatt et al,, 3 How., 410.
Woods vs. Banks, 14 N. H., 111.
Walker vs. Quigg, 6 Watts (Penn.), 87.

The improvements were erected after actual knowledge of appellee's entry, and hence were not made in good faith, under color of title.

Lee vs. Bowman, 35 Mo., 402.

Woodhull vs. Rosenthal, 61 N. Y., 382.
Wood vs. Wood, 83 N. Y., 575.
Thompson vs. Thompson, 16 Wis., 91.
Morrison vs. Robinson, 31 Penn st., 456.
Tatum vs. McLellan, 56 Miss., 352.
Bellows vs Copp, 20 N. H., 492.
Ragsdale vs. Gohlke, 36 Tex., 286.
Burkle vs. Ingham, 42 Mich., 513.
Wales vs. Coffin, 100 Mass, 117.
Bristoe vs. Evans, 2 Ower (Tenn.), 341.
Kettle vs. Ege, 82 Tenn., 293.
Green vs. Biddle, 8 Wheat, 1.
Canal Bank vs. Hudson, 111, p. 81.

If the townsite could have been entered upon mineral land, if the answer alleges facts so clear that a Court of equity could decree that the appellee holds the land in trust, he would hold it in trust for the Probate Judge who would execute that trust under the regulations prescribed in the laws of Dakota 1881, p. 216, and appellant could not receive the legal title until he had complied with those regulations and in case of his failure so to do the land would go to the school authorities.

Cash vs. Selby, Appellants, 6 Mich. 193.

The copy of the opinion in this case not having been filed with the clerk until the following term after the decision of the case, and therefore not appearing in the record, we have annexed it hereto, as we have also for the convenience of the Court, printed the opinion of the commissioner of the General Land Office, and so much of that of the Hon. Secretary of the Interior as bears upon the point raised in this case.

For the reason stated herein we respectfully pray an affirmance of the judgment of the court below.

ADONIRAM J. PLOWMAN,
Counsel for Appellee.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., February 4, 1880.

Register and Receiver, Deadwood, Dakota.

GENTLEMEN:—I have examined the record of testimony taken at the hearing ordered by letter from this office, dated April 10th, 1879, to determine the character of the land embraced in the entry of the townsite of Deadwood, made July 29th 1878, by John R. Fraser, probate Judge of Lawrence county, Dakota.

At the hearing you held that the burden of proof devolved upon the mineral claimants to establish the mineral character of the land. In making these rulings you were in error. The said entry was made upon unsurveyed lands; the lands were in a well known mineral region; several mining claims had already been entered and many more located. In short, it is well known as a matter of recent history that the mineral character of the locality was the sole incentive to the immigration which peopled the district, resulted in the release of the same from the Sioux Indian reservation, and made necessary the establishment of a United States land office in that place. No formal withdrawal of the lands in question could have added force to the presumption of their mineral character. They were before unsurveyed land, and hence, no withdrawal could have given them a description by particular designation, while the law itself reserved them by their known character for conditional disposal only. It also may be added that by no official act or proceedings was a presumption of their non-mineral character ever raised. The presumption was that the lands were mineral; and the burden of proof, therefore was upon those who claim to enter them as non-mineral lands.

By the decision of this office in the case of the townsite of Central City, Colorado, vs. Mineral Claimants, dated

December 23, 1875, and affirmed by the Hon. Secretary of the Interior, June 6, 1876, the mineral and townsite laws (Sec. 2386 R. S.) were construed to permit townsite entries *overlying lode claims.* In this, the two laws aforesaid are consistent, as a surface proprietorship by the town is compatible with an adverse ownership of veins of ore beneath; and the the law seemed clearly to contemplate that condition of things, as will appear by reference to said section 2386, which limited its provisions to town proprietorship of the surface over *veins.*

In *placer* mining land, however, no fact is better established than that the surface is essential to its development as mining ground. By decision of the Hon. Secretary of the Interior, dated March 4, 1879, in the case of Kemp et al vs. Starr, in Leadville, Colorado, it was declared, the land being placer, that as it was "valuable for minerals" it was not subject to entry as a townsite, and that the testimony introduced to show that the land was more valuable for town purposes than for mining, was improperly received.

If, therefore, the land embraced in the townsite of Deadwood is valuable for placer mines, it cannot be patented to the trustee of the town, to be sold by him under local laws.

The record of testimony consists of upwards of eighteen hundred manuscript pages, a volume too great to be discussed in detail. It has been carefully read however, and the conclusion reached that no portion of the land entered as the townsite of Deadwood (which includes that of Ingleside) is proven to be non-mineral; that is to say, that the presumed mineral character of the land has not been rebutted. I am further of the opinion that all of the land included within said townsite, claimed for placer mining purposes, respecting which testimony was taken, has been conclusively shown by the testimony to be valuable

for minerals, and, hence, must be held for disposal under the mining act, and patent cannot issue therefore for townsite purposes.

I find from the testimony that several of these claims have yielded large quantities of gold. It is undisputed that from one more than fifty thousand dollars worth of gold was taken; from another, more than forty thousand dollars; and several have yielded from four thousand dollars to twenty thousand dollars. Other claims, where the aggregate yield is not stated, have produced from three dollars to ten dollars per day to the man employed in working the same.

A number of claims, shown by prospecting, to contain gold, have yielded no return, and the testimony shows that no attempt has been made to work them, further than required by the local laws for their "representation." It further appears that at the present time none of the claims are being worked, except for the purpose of sustaining the possessory title. I am led to believe, that with perhaps a few exceptions, none of these claims can be worked with profit until the owners shall have unrestricted possession of the ground for mining purposes. Ditches must be dug and those already constructed kept open for the passage of water; space must be had for the deposit of tailings or refuse; and the surface of the ground must be unencumbered, that it may readily be removed, washed out and the gold extracted. All of these conditions are absolutely incompatible with the existence of streets, alleys and buildings; and hence the argument of counsel for the townsite, that patent should issue to both parties, the townsite and mineral applicants, if concurred in and acted upon, would allow but one party to derive advantage from the grant. If used for townsite purposes it cannot be mined.

Prior to the 28th day of February, 1877, the entire tract in controversy was included within the limits of the Sioux

Indian reservation; and all persons, other than these Indians and certain agents of the government were forbidden by law under severe penalties, from making settlement therein for any purpose whatever. Notwithstanding this prohibition, the country was visited by prospectors who discovered gold, and the reports of these discoveries led to a large influx of population. Placer claims were found on land now in controversy, and were worked for the gold they contained. These claims were staked off, in accordance with local rules, and recorded, by which the character of the land was given the utmost notoriety. These locations were void and unlawful, and under them the locators gained no title whatever, yet they served the purpose of giving notice to all concerned of the character of the land. While portions of the claims were being worked for the gold they contained, other portions were rapidly occupied for various purposes; and at the ratification of the agreement with the Sioux Indians quite a populous town had become established. At this date, February 28, 1877, the land was rendered subject to general occupation, and a lawful settlement might for the first time be made.

Theretofore, the occupation of the land by miner, merchant, or any other person was alike unlawful, and prohibited under penalty provided by law; thereafter it might be occupied in accordance with law. Section 2318 R. S. reads: "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."

If the land was "valuable for minerals" as claimed, it could under section 2318 only be lawfully claimed for mining purposes; and the fact that improvements had been made by persons acting at their peril, in direct violation of law, gave them no sort of color of right to retain possession of the same to the prejudice of others claiming in pursuance of law. If the land was non-mineral, no valid mining location could have been made upon it.

The large population was attracted to Deadwood by the mineral discoveries, engaged in the various occupations called for in a mining camp. A municipal government was established, streets and alleys were laid out, and many buildings, temporary and permanent, were erected.

The operations of the miners soon clashed with these town improvements. Some of the mineral claimants made application for patent and entered their claims, and others were preparing to take the same steps to procure full title to their lands; whereupon these claiming for townsite purposes petitioned the probate judge of Lawrece County to enter the land for townsite purposes, which he did.

The miners were restrained in many instances from working their claims, sometimes by the road commissioner, and at other times by warrants in the hands of the sheriff, and again by the citizens themselves acting without color of authority. Ditches were filled up, sluice boxes and drains destroyed, and the miners themselves sometimes arrested and put under bonds to refrain from further injuring town improvements or those of private citizens. Though the miner was not actually evicted from his claim, he was only allowed the barren privilege of digging therein, but if without the power to construct ditches to bring and carry away water, such permission was without practical value. In short, Deadwood assumed the powers and privileges of a municipal government, unrestricted by United States laws, and in pursuance thereof its officers took ordinary measures and precautions to keep its thoroughfares open to public travel—proceedings proper enough where the town authorities are entitled to jurisdiction but otherwise when they would defeat rights guaranteed by United States laws.

It is the settled policy of the government to encourage the development of mines and the production of the precious metals. The law makes every other claim to the public lands subordinate to their occupation and possession

for mining purposes; and no deviation from this policy is made in favor of townsites, the mining interests being jealously protected where it permits land overlying veins to be patented for townsite purposes.

In conclusion, I must hold that all of the land claimed for mining purposes, as to which testimony was taken at the hearing, is shown to be valuable for minerals. These claims are designated as follows: Mineral lots (as designated by the surveyor general) Nos. 38, 76, 72, 45, 53, 71, 78, 97, 86, 83, 75 and 107; placer claims 13, 14 and 15 above discovery, and 16, 13 and 24 below discovery, Lost Mining District; claims 16, 17, 18 and 19 above discovery, Whitewood Mining District; and claims Nos. 8, 9 and 10 on Whitewood Creek, in the northeastern portion of the townsite of Deadwood, concerning the three claims last named, I am unable to determine, from the testimony and maps submitted, whether the same are situated n Lost or Whitewood Mining District.

As to the land lying outside of the placer claims, there is not sufficient testimony to enable me to form an intelligent opinion as to its character. The adjacent land having been shown to be valuable for minerals, strengthens the presumption which heretofore obtained as to the whole tract, and this outside land will still be regarded as mineral until the contrary be proven. The only testimony offered at the hearing relating to this portion of the townsite was that of Mr. L. C. Miller, an insurance and mining broker, who claims to be an experienced placer miner. He says that there are no mining claims located outside of the gulches, and from the character of the ground, it is well known that there is no pay in it. This I must hold is insufficient to rebut the presumed mineral character of the land, supported as the presumption is by the testimony which shows the adjoining ground to be valuable mineral land.

A motion for a new hearing as to this doubtful portion

will be entertained when the present townsite entry shall have been finally disposed of.

The town of Ingleside is included within the limits of Deadwood and both entries must be held for cancellation.

J. M. ARMSTRONG,
Acting Commissioner.

Copp's Land Owner Vol. 8, May 1881, p. 18.

TOWNSITE OF DEADWOOD.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, Dec. 19, 1881.

The Commissioner of the General Land Office:

SIR: I have considered the appeal of Joseph V. Oflenbacher, Probate Judge of Lawrence county, Dakota Territory, from the decision of your office of February 4, 1880, holding for cancellation cash entry No. 2 of the townsite of Deadwood, Deadwood Land District, Dakota Territory, for the reason that all the land embraced thereby is placer mining ground and valuable for minerals.

A motion was made in behalf of some of the mineral claimants to dismiss the appeal, on the ground that the towsite was simply a protestant without right of appeal. While this may be true as to lands entered under the mining laws prior to July 29, 1978, date of townsite entry, it is not true as to other lands, as to which the appeal must be considered and the motion overruled. As to the lands entered prior to July 29, 1878, under the mining statutes, the testimony will be considered as if taken upon an official investigation of the validity of said entries.

On the 16th of June, 1878, Jno. R. Fraser, Probate Judge of said county, made an entry of the townsite of Ingleside; and on the 29th of July, 1878, acting in the same capacity, he made the Deadwood townsite entry, which embraces all of Ingleside. His successor asked to have the Ingleside entry canceled.

You held the entry for cancellation, from which action no appeal was taken. This matter, therefore, requires no further consideration in connection with the case. The case presents three questions for decision, viz:

First. Is the land included in the townsite entry or any portion thereof placer mining ground, and in contemplation of law valuable for minerals? Should this point be resolved in the affirmative, then,

Second. Is such land subject to townsite entry?

Third. In the event it should be decided to issue patents for mineral claims within the townsite limits, and a patent upon the townsite entry, or a portion thereof, would it be competent to insert therein clauses of reciprocal reservations in favor of the mineral and townsite claimants?

It is true that in the argument of this case another question, that of priority of occupation as between mineral and townsite claimants, was discussed and urged upon my attention; but it seems to me that the question does not properly arise in this case, if, indeed, it can in any case in which title is sought to the same land by placer and townsite applicants.

The facts bearing upon this point are briefly as follows:

The Black Hills country, in which the lands in question are situated, was embraced within the lines of the reservation set apart to the Sioux Indians by the 2d article of the treaty of April 29, 1868 (15 Stats. 635). In said article it was solemnly agreed, on the part of the United States, that no persons except those designated in the treaty, and

thereby authorized so to do, and except such officers, agents, or employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, should ever be permitted to pass over, settle up, or reside, in the territory described in said article. This was the status of the lands until the ratification of the agreement between the United States and the Sioux, by which the Black Hills country was relinquished to the United States, to-wit: February 28, 1877 (19 Stats. 254.)

It appears from the testimony that as early as 1875, miners had commenced operations in the vicinity of the present city of Deadwood, and from that time forward people rushed in there in great numbers, so that in 1876 there was a large community in that vicinity, not only engaged in mining, but in various other pursuits. The miners established *quasi* mining districts, adopted local rules and regulations, and thereafter located mines. The inhabitants of the town that had sprung up also organized a municipal or *quasi* municipal government, early in the spring of 1876, and laid out a town, establishing streets, alleys, blocks, and lots, upon the ground located as mineral. Frequent conflicts and controversies arose between the miners and the self-constituted town authorities, which resulted, in many instances of regular mining operations, in a suspension of mining in the thickly-settled portion of the town prior to the ratification of said agreement; but many of the claims located appeared never to have been regularly worked. These things occurred while the land was in an Indian reservation, and it follows that the occupancy of the land, both by the miners and the townspeople was in open violation of solemn treaty stipulations, and that none of the parties were there with even a shadow of right. There were no valid mining locations or townsite selections. This was the condition of affairs when the agreement aforesaid was ratified; and when the country fell into the category of public lands, February 28, 1877, this mixed hostile oc-

cupancy and claim existed, and continued about the same until the time of the investigation before the local office.

After the ratification of said agreement, the mining claimants re-located their claims, in many cases covered by town improvements. and some of the mining claimants secured surveys and made entries; the town authorities also procured a survey of their site and entered the land, which entry was allowed by the local officers, regardless of the prior entries by the mining applicants.

Thus it appears that as regards the claims about which testimony was taken, there was no priority in either the town or the mineral claimants in respect to occupancy or selection, none of them having any right there prior to February 28, 1877. * *

S. J. KIRKWOOD,
Secretary.

Copp's Land Owner Vol. 8, Jan. 1882, p. 153.

SUPREME COURT OF DAKOTA.

HAWKE v. DIFFENBACH.

SAME v. EDWARDS.

Filed February 16, 1885.

1. PUBLIC LANDS—MINERL LANDS—TOWN SITE ENTRIES.

No title can be acquired, under the provisions of the town-site laws, to lands known to be valuable for minerals, as such lands are free and open for exploration, occupation, and purchase for mining purposes.

2. SAME—EJECTMENT—IMPROVEMENTS.

Where lands are entered under the town-site act, and improvements made thereon, by one who has knowledge that they are mineral lands, the value of such improvements cannot be recovered in an action of ejectment brought by a plaintiff to whom such lands have been patented as mineral.

EDGERTON, C. J., dissenting.

On appeal from First Judicial district, county of Lawrence. On demurrers to answers.

Albert Allen for appellants. Adoniram J. Plowman (with whom was Edward Van Cise) for respondents.

CHURCH, J. These cases, with the one following, (*Pierce* v. *Sparks*, post, 491,) are typical of a series of cases involving the title to a large amount of valuable property in the mining towns of the Black Hills. The two now under consideration present the same essential conditions, and will be so treated; the facts hereinafter given being those especially pertaining to the one first mentioned. The case of *Pierce* v. *Sparks* presents some different features, which will be seperately considered. The actions were for ejectment. The plaintiff averred title in fee-simple to lands embracing the premises in controversy by virtue of a patent from the United States conveying said lands to him as a placer mining claim. The entry by defendant Deffenbach is alleged to have been made on or about July 1, 1878, with full notice of plaintiff's claim, and after service of written notice not to enter or make any improvements. The answer, denying each and every allegation of the complaint, except as thereinafter stated, set up—*First*, facts, hereinafter more particularly stated, under which defendant claims an equitable right to a decree that plaintiff holds the premises in trust for him; praying specifically that he be decreed to convey to the defendant said premises in controversy, excepting and reserving to the plaintiff in such conveyance the right to mine and extract the precious metals from said premises,

provided that in so doing the plaintiff shall not materially injure, endanger or interfere with the buildings and improvements thereon, and the necessary occupation of the premises by defendant. *Second*, the same and additional facts by way of counter claim, under which it is prayed "that in the event it should be determined that the plaintiff is the owner and entitled to the possession of said premises, then that the value of the land, aside from the value of the improvements thereon, and also that the seperate value of the improvements be specifically found, and that the defendant have judgment for the value of his said improvements."

The answer also contained the usual prayer for further relief. To each branch of these answers, which were substantially the same in both cases, general demurrers were filed. The demurrers were sustained, with leave to answer over; but the defendants electing to stand on the order sustaining the demurrer, judgments were entered for the plaintiff, in which, by stipulation without prejudice, the damages for detention and for use and occupation were assessed at one dollar each. From these judgments these appeals are taken.

Recurring now more specifically to the case of Deffenbach. Upon the first branch of the case, in which the main question involved is the title to the premises in controversy, these facts may, for the purposes of the demurrer, be considered as admitted: *First*, That on February 28, 1877, the day upon which the treaty opening the Black Hills for settlement went into effect, a considerable tract of land, embracing the premises in question, was settled upon and occupied by a population of some 2,000 people, for purposes of business and trade, and other municipal purposes, and laid out into lots, blocks, streets and alleys, comprising the town of Deadwood, and that the premises in question, as one of the lots so laid out, then were and ever since have been occupied and possessed for municipal purposes by the defendant or those under whom he

claims. *Second*, That on November 20, 1877, plaintiff made an application to the United States land office at Deadwood for a patent for a certain placer claim, embracing these premises, and that on January 31, 1878, plaintiff duly entered said land at that office for said patent, paid the price, and received the usual receipt. *Third*, That plaintiff's placer claim was not located or claimed by plaintiff or any other person until after the selection, settlement upon and appropriation of the land as aforesaid for town site purposes. *Fourth*, That on July 29, 1878, the said town site of Deadwood, embracing within its limits the plaintiff's placer claim, was entered at the same land office by the probate judge of Lawrence county, under the provisions of the town site act of 1867, in trust for the use and benefit of the occupants thereof, including the defendant. *Fifth*, That thereafter, a controversy having arisen between the plaintiff, in common with other persons similarly situated, and said probate judge, as trustee for said town site occupants, as to their respective rights to a patent for these lands, the commissioner of the general land office, April 10, 1879, ordered a hearing before the Deadwood land office, between the parties, which hearing was restricted by the order of the commissioner to the single question of the mineral or non-mineral character of the land, and that, although the defendant and other beneficiaries under said trust offered at the hearing to prove, and did prove, their prior selection, use, and occupation of said land for town site purposes, and no dispute was made as to the facts in this respect, yet the local land office, and subsequently, upon appeal, the commissioner, and finally the secretary of the interior, excluded such proof from consideration; and having determined from the evidence adduced that the land was valuable for minerals, canceled the entry made by the probate judge, in so far as it included these lands, and granted a patent to the plaintiff, pursuant to his said application and entry, which patent was issued January 31, 1882.

It was held by the learned secretary under whose decision the patent issued, that, it having been established that these lands were valuable for minerals, being placers, they "were not subject to town site entry; and to that extent"—that is, to the extent that it embraced such lands—"the town site entry of Deadwood should be canceled;" and, further, that "the surface being absolutely required for the full enjoyment of the lands by either placer or town site owners, it is not competent to insert clauses of reservation in the town site or mineral patents." This last ruling was made in response to a claim made on behalf of the town site occupants, that, instead of canceling any part of the town site entry, a patent should be issued for the whole, containing a reservation protecting "valid mining claims and possessions," and that patents should be issued to the plaintiffs and other mining claimants, containing reservations or exceptions protecting the surface proprietorship of the town site occupants. If this decision was correct it disposes of that branch of the case now under consideration.

This determination presumptively establishes plaintiff's right to the ground in controversy, and, unless it appears from the facts averred in the answer that the land department, in granting that patent, committed some error of law whereby the defendants' rights were prejudiced, that presumption is conclusive. The patent is evidence of a perfect right established by the final adjudication of the tribunal erected for the especial purpose, and carries with it the presumption that every requisite prescribed by law for the acquisition of titles has been duly performed.

Smelting Co. v. Kemp, 104 U. S, 636.
Steel v. Smelting Co., 106 U. S., 447.
S. C. 1 Sup. Ct. Rep. 389, and cases cited.

It will be observed, as implied in this proposition, that, in order to avail himself of any error which may have been committed by the department, the defendant must

claims. *Second*, That on November 20, 1877, plaintiff made an application to the United States land office at Deadwood for a patent for a certain placer claim, embracing these premises, and that on January 31, 1878, plaintiff duly entered said land at that office for said patent, paid the price, and received the usual receipt. *Third*, That plaintiff's placer claim was not located or claimed by plaintiff or any other person until after the selection, settlement upon and appropriation of the land as aforesaid for town site purposes. *Fourth*, That on July 29, 1878, the said town site of Deadwood, embracing within its limits the plaintiff's placer claim, was entered at the same land office by the probate judge of Lawrence county, under the provisions of the town site act of 1867, in trust for the use and benefit of the occupants thereof, including the defendant. *Fifth*, That thereafter, a controversy having arisen between the plaintiff, in common with other persons similarly situated, and said probate judge, as trustee for said town site occupants, as to their respective rights to a patent for these lands, the commissioner of the general land office, April 10, 1879, ordered a hearing before the Deadwood land office, between the parties, which hearing was restricted by the order of the commissioner to the single question of the mineral or non-mineral character of the land, and that, although the defendant and other beneficiaries under said trust offered at the hearing to prove, and did prove, their prior selection, use, and occupation of said land for town site purposes, and no dispute was made as to the facts in this respect, yet the local land office, and subsequently, upon appeal, the commissioner, and finally the secretary of the interior, excluded such proof from consideration; and having determined from the evidence adduced that the land was valuable for minerals, canceled the entry made by the probate judge, in so far as it included these lands, and granted a patent to the plaintiff, pursuant to his said application and entry, which patent was issued January 31, 1882.

It was held by the learned secretary under whose decision the patent issued, that, it having been established that these lands were valuable for minerals, being placers, they "were not subject to town site entry; and to that extent"—that is, to the extent that it embraced such lands—"the town site entry of Deadwood should be canceled;" and, further, that "the surface being absolutely required for the full enjoyment of the lands by either placer or town site owners, it is not competent to insert clauses of reservation in the town site or mineral patents." This last ruling was made in response to a claim made on behalf of the town site occupants, that, instead of canceling any part of the town site entry, a patent should be issued for the whole, containing a reservation protecting "valid mining claims and possessions," and that patents should be issued to the plaintiffs and other mining claimants, containing reservations or exceptions protecting the surface proprietorship of the town site occupants. If this decision was correct it disposes of that branch of the case now under consideration.

This determination presumptively establishes plaintiff's right to the ground in controversy, and, unless it appears from the facts averred in the answer that the land department, in granting that patent, committed some error of law whereby the defendants' rights were prejudiced, that presumption is conclusive. The patent is evidence of a perfect right established by the final adjudication of the tribunal erected for the especial purpose, and carries with it the presumption that every requisite prescribed by law for the acquisition of titles has been duly performed.

Smelting Co. v. Kemp, 104 U. S, 636.
Steel v. Smelting Co., 106 U. S., 447.
S. C. 1 Sup. Ct. Rep. 389, and cases cited.

It will be observed, as implied in this proposition, that, in order to avail himself of any error which may have been committed by the department, the defendant must

show some legal or equitable right in himself; such that if the error should be corrected he would be entitled to the land in controversy.

Cases above cited;

Also, Johnson v. Towsley, 13 Wall., 72.

Such an error, the defendant claims, was committed by the department in restricting the hearing, upon the controversy above referred to, to the question of the mineral or the non-mineral character of the land, and in ignoring the proof submitted of the prior occupancy of the premises for town site purposes; and the defendant, therefore, claims that the plaintiff should be adjudged to hold the premises as his trustee, and decreed to convey the same to him accordingly. The propriety of this species of relief, in a proper case, may be conceded. It is in accordance with the doctrine of numerous cases in the state and United States courts.

Stark v. Starrs, 6 Wall., 418.

Quinby v. Conlan, 104 U. S., 420.

Its applicability to the present case is the main ground for contention.

Passing by, for the present, the question whether the defendant could, in this indirect way, acquire a title, for town site purposes, to land not in fact embraced within the limits of any patented town site, or whether the desired relief should not be sought in the name of the probate judge as trustee for all of the town site occupants, I proceed to consider the main question arising upon this demurrer. The policy of the government to reserve from sale and from the operation of ordinary grants, general and special, its mineral lands, has been declared in so many statutes, and by so many adjudications of the Supreme court of the United States, that it is unnecessary, at this time, to enter upon an extended review of the history of its legislation in this regard. One or two citations will be sufficient to show with what emphasis the policy referred

to has been declared. In the case of U. S. v. Gratiot, 14 Pet., 538, decided in 1840, the court says: "It has been the policy of the government at all times, in disposing of the government lands, to reserve the mines for the use of the United States; and their value cannot be ascertained without causing them to be explored and worked under proper regulations." And, again, in the case of Mining Co. v. Consolidated Mining Co., 102 U. S., 174, decided in 1880, the court, after speaking of the government in respect to its mineral lands, says: "Congress enacted, in 1866, a complete system for the sale and other regulation of its mineral lands, so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States."

Prior to the year 1866, although the privilege of exploring the public lands for mineral deposits and of extracting and appropriating the precious metals, had been conceded in various ways by the government, no statutory regulations of the privilege had been adopted, nor had the government indicated any general purpose to part with its title to mineral lands upon any conditions. In 1866, however, a statute was enacted (14 U. S. St. at Large, 251) which, as has already been stated in the decision of the Supreme court last quoted, provided a complete system for the sale and other regulation of these lands. The mineral lands of the public domain were thereby declared to be free and open to exploration and occupation, under certain conditions therein mentioned, and provision was made for the issuing of patents to those who might desire to purchase This latter provision, in terms, applied only to veins or lodes of quartz or other rock in place. By the amendment of 1870, however, (16 U. S. St. at Large, 217,) the right of the purchase was extended to placer claims; and by the act of 1872, entitled "An act to promote the development of the mining resources of the United States," (17 U. S. St. at Large, 91,) both of the preceding acts

were practically revised and consolidated, and it was enacted that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase," as therein provided; and this is the law as it stands in the Revised Statutes, section 2319. Section 2318 of the Revised Statutes is as follows: 'In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." By section 2325 it is provided that "a patent for any land claimed and located for valuable deposits may be obtained in the following manner: * * * And [the applicant] shall thereupon be entitled to a patent for the land."

Thus it will be seen that after providing that lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law, and that all valuable mineral deposits in public lands are open to exploration, occupation and purchase under regulations prescribed by law, congress proceeds to prescribe how these valuable lands may be occupied and purchased, and under what terms they will be sold and title to them conveyed by the United States. And it should be noticed that the patent, when issued, is for the land, and that it conveys to the patentee not only the common law right to the full enjoyment of the surface and all below it, but also the right, in the case of a vein, to pursue that vein throughout its entire depth, even though it may pass beyond the vertical side lines of the surface location.

Such being the law in relation to mineral lands, it is contended by the defendant that such lands are nevertheless subject to entry for town site purposes, and that if the town site occupant has selected and occupied, for purposes of business or trade, any mineral land before it has been located or occupied for mining purposes, he is en-

titled to have it included in the town site entry, and to receive a deed for it from the trustees; and that, where mining claims have been located prior to the actual entry of the town site, patents should issue to both parties, with the respective reservations indicated, protecting such mining claims and possession on the one hand, and the surface proprietorship and improvements of the town site occupants on the other. These propositions are based mainly upon the construction given by defendant to sections 2386 and 2392 of the Revised Statutes, which constitute part of the present chapter relating to town sites upon public lands, although not of the law of 1867 as first enacted. Section 2386 is as follows: "When mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof, but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States."

It is argued by defendants' counsel that the section is a legislative recognition of and provision for cases where mineral lands are embraced within the limits of town sites, and that it follows from such recognition and provision that the legislature did not intend to reserve mineral lands from town site entry, but only to protect existing possessory rights of miners in vein or lode claims. This argument is doubtless based upon and derives some support from a decision of the honorable secretary of the interior of June 6, 1876, in the case of the *Townsite of Central City, Colorado*, v. *Mineral Claimants*, to the effect that the mineral and town site laws, referring to section 2386, permit town site entries overlaying lode claims, and that a surface propretorship by the town is compatible with an adverse ownership of veins of ore beneath. In accordance with this decision patents for vein or lode claims within the limits of town sites have been and are issued with a

clause excepting and excluding all town property rights upon the surface, and all houses, buildings, structures, lots, blocks, alleys, or other municipal improvements on the surface, not belonging to the patentees, and all rights necessary or proper to the occupation, possession and enjoyment of the same; and townsite patents are issued embracing the same land, with the reservation of mining rights above referred to. In other words, as it seems to me, a precautionary enactment, obviously designed for the protection of the miner in pursuance of the then already well defined policy of the government to encourage the development of its mineral resources, is so construed as not only to deprive the miner of some of the most valuable rights and privileges expressly secured to him by other statutes, but to confer upon the townsite occupants rights and privileges from which by other statutes they are expressly excluded; for this land, being "valuable for mineral," is by the statute reserved from sale unless expressly directed by law. Not only the mineral deposit but the land itself is so reserved, and is open to exploration, occupation and purchase by the miner. A price is fixed for the land much beyond the demand for townsite lands, which may be entered at the minimum price, and the patent which the law provides conveys the land in fee.

Moreover, it is expressly provided by section 2322 that the locators of mining claims shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations. And surely it cannot be contended that one who purchases and receives the patent of the United States for his mining claim acquires by that deed rights less extensive than those which he has heretofore held by mere location and occupation. A sale is as much prohibited by law of congress, when to allow it would defeat the object of that law, as though the inhibition were, in direct terms, declared.

Shepley v. Cowan, 91 U. S., 336.

I know of no rule of construction which would give to

this section 2386 the effect claimed for it, or disclose in it any purpose to permit townsite entry upon known mineral lands. On the other hand, I think the construction insisted upon by the defendants opposed to the letter and whole spirit of the laws relating to the disposal of the mineral lands of the United States. The case of *U. S.* v. *Gear*, 3 How. 120, is instructive upon this point. By the act of 1807 it was provided that the several lead mines in Indiana should be reserved for the future disposal of the United States, and any grant which might thereafter be made for a tract of land containing a lead mine, which had been discovered previous to the purchase of such tract from the United States, should be considered fraudulent and null. By another act, passed in 1834, authority was given to the president to cause to be offered for sale all the lands lying in certain land districts, (within the former territory of Indiana,) reserving only section 16 in each township, with certain other specified reservations, and concluding with the words, "any law of congress heretofore existing to the contrary notwithstanding."

It was contended by the defendant that, as certain reservations were made in the statute of 1843, lead mines not being among them, and as the act contained a general disaffirmance of all previous conflicting acts, lands containing lead mines were open to entry. But the court say: "The reservations in the fourth section of the act of 1834 are limitations upon the authority to sell, and not an enlargement of the general power of the president to sell lands which by law he never had a power to sell, which have always been prohibited from being sold, and which never have been sold, except under the authority of some special statute." "Authority, then, to sell all lands in these districts, though coupled with the concluding words of the fourth section, can only mean all lands not prohibited by law from being sold, or which have been reserved from sale by force of law." And, again, after stating that these two statutes did not present a case where the later

act must be held to modify or repeal the earlier, the court proceeds as follows: "The rule is that a perpetual statute, (which all statutes are unless limited to a particular time,) until repealed by an act professing to repeal it, or by a clause or section of another act, directly bearing in terms upon the particular matter of the first act, notwithstanding an implication to the contrary may be raised by a general law which embraces the subject matter, is considered still to be the law in force as to the particulars of the subject matter legislated upon."

Perhaps the pertinency of the foregoing observations to the case at bar may be somewhat more apparent when we consider the circumstances under which section 2386 was entered. It is true that it now forms a part of the entire system of laws designated as the Revised Statutes, approved June 22, 1874, of which the laws hereinbefore cited, relating to the disposition of mineral lands, are also a part; and this fact alone may be considered to forbid the idea that this section was intended to operate as a removal or modification of the limitation imposed by those laws upon the sale of mineral lands. But I think we are not precluded from an examination of the original statute, and ascertaining from it, if possible, its primary purpose.

McDonald v. Hovey, 110 U. S., 619.
S. C. 4 Sup. Ct. Rep., 142.

This section was first enacted as the concluding proviso of an act approved March 3, 1865, (13 U. S. St. at Large, 529,) supplemental to an act approved July 1, 1864, for the disposal of coal lands and town property in the public domain. The act of 1864, (Id. 343,) among other things, provided that upon the establishment of a town upon the public lands in the manner therein prescribed, it should be lawful for the president to cause the lots to be offered at public sale to the highest bidder, subject to a minimum price of $10 per lot, and that such lots as might not be disposed of at such sale should thereafter be liable to pri-

vate entry. The supplemental act contained some further provisions as to the price of such lots, and concluded with a proviso in the words which now constitute section 2386.

It seems clear, therefore, in the first place, that this section applies only to town lots acquired under the provisions of the preceding sections of this chapter, comprising the acts of 1864 and 1865, just referred to.

See McDonald v. Hovey, supra.

And in view of the fact that at the time the section was first enacted no provision whatever had been made for the acquisition of title to mineral lands, nor had there been any statutory regulation of the possessory rights of miners, I think it equally clear that the purpose of this section was precautionary, to protect any mining rights which might be found to exist within any such townsite under these local customs and regulations, which have been frequently recognized by the government. If it be asked why congress did not then expressly prohibit the acquisition of title to mineral lands under the provisions of that act, it may be answered, for the same reason that the act of 1864, above referred to, contained no such prohibition—none was necessary. The president was authorized to cause these lots to be offered for sale, and it was not to be supposed that he would offer for sale, as town lots, any land known to be valuable for minerals, in opposition to the well established policy of the government; yet many cases might arise to call into operation the provisions of this section; for instance, land might be claimed as non-mineral which was actually in possession of a miner; or a miner's claim, located and worked in accordance with local customs and regulations, might embrace more of the surface than the townsite claimants should deem necessary; or the miner, in pursuit of his vein or lode, might find it extending beyond the surface lines of his claim, and under the surface of an adjoining town lot. In all such cases the possessory rights of the miner would be

protected by the statute; and in this connection it is significant that by section 2 of the act of 1866, (14 U. S. St. at Large, 251) it is expressly provided that land adjoining any lode claim shall be sold subject to this consideration.

I can find no warrant whatever in this section for the claim of the defendant, that lands known to contain valuable mineral deposits are, nevertheless, open to townsite entry. The construction I have given it is in harmony with the entire policy of the government respecting its mineral lands, and, at least, does not lead to the anomaly of two conveyances of the same land to different parties for different purposes, each requiring, for that full enjoyment contemplated by the law, the exclusive possession of the entire surface. But it is insisted by the defendant that section 2392 affords further manifestations of the legislative intent to permit townsite entries upon mineral lands; and this for substantially the same reason before urged, viz., that because certain specified mining rights are expressly protected, mineral lands in general are thereby opened to entry—a sort of reversal of the old maxim, which would make it read, *exclusio unius est expressio alterius*, with a new and enlarged meaning. Let us examine this section. Its first sentence was enacted March 2, 1867, as the concluding proviso of an act for "the relief of the inhabitants of cities and towns upon the public lands,"—(14 U. S. St. at Large, 54, the townsite law under which the Deadwood entry was made.) It then comprised only the first sentence of the present section, viz.: "that no title shall be acquired, under the provisions of this act, to any mine of gold, silver, cinnabar or copper." There was considerable discussion, upon the argument of this case, as to the meaning of the word "mine" in this section; the defendant insisting that it must be limited to veins or lodes of minerals. But, upon careful examination of the statute I am satisfied that the word "mine," in this section, is nearly synonimous with the word "deposit," or, possibly, with the words "land containing deposits."

Section 2318 speaks of "lands valuable for minerals;" section 2319, of "valuable mineral deposits;" section 2323 of tunnels run "* * * for the discovery of mines," (here equal to mineral deposits); section 2325 of land located for "valuable deposits;" and section 2392 of "mines of gold," etc.; and all these, I think, refer to substantially the same thing, and embrace both veins or lodes and placers. I think it clear, also, that the proviso was inserted solely in pursuance of the usual policy of reservation and exception of lands valuable for minerals, to prevent the acquisition of title to such lands under the provisions of the townsite act, which designates as open to entry for townsite purposes thereunder "any portion of of the public lands * * * settled upon and occupied as a townsite, not subject to entry under the agricultural pre-emption laws."

Rev. St., section 2387.

So far, therefore, from strengthening the claim of the defendant, this proviso, as it seems to me, utterly defeats it, for it makes it incumbent upon him, before he can obtain a patent for this land for town site purposes, to show affirmatively that the land does not contain mines of gold, etc. So, at least, the Supreme court of the United States has held in a case which seems to present just this question—the case of *Secretary* v. *McGarrahan*, 9 Wall., 298. The act to quiet land titles in California, July 23, 1866, provided that "where persons in good faith, for valuable consideration, have purchased lands of Mexican guaranties, which grants have been subsequently rejected, and have used, improved and continued in the actual possession of the same, and where no adverse right or title exists, such purchaser may purchase the same under regulations, etc.; provided that the right to purchase herein given shall not extend to lands containing mines of gold, silver, copper or cinnabar." The court held that it was necessary for a claimant under this act to aver and prove that the lands did not contain mines of gold, silver, copper or

cinnabar; as necessary for him to aver and prove that he was a purchaser in good faith and for a valuable consideration, and that if the lands did in fact contain such mines he was not entitled to a patent. It is difficult to distinguish that case in principle from the on at bar. The remaining words of this section, "or to any valid mining claim or possession held under existing laws," are first found in the act of 1868, (15 St. at Large, 671,) amendatory of the act of 1867, where they are inserted as a distinct proviso. independent of the words with which they now stand connected.

The meaning of the term "mining claim" has been defined by the Supreme court, in the case of *Smelting Co.* v. *Kemp*, 104 U. S., 649, as follows: "A parcel of land containing precious metals in its soil or rock;" and as the subject of the argument in that cause was a placer claim, of course the definition of the court included such claims. True, at the time this proviso was first enacted placer claims had not as yet been the subject of express statutory regulations or recognitions, but they formed a very important part of the mining industry of the country, and as the words used are broad enough to include them, there is every reason to suppose that they were within the immediate contemplation of the makers of the law. Their purpose, too, seems clear. It was evidently similar o that already pointed out with reference to section 2386, to protect any mining claims which might be found to exist within the limits of any townsite. Possibly they were unnecessary for this purpose, and were introduced out of abundance of caution.

The case of *Morton* v. *Nebraska*, 21 Wall. 660, presents a similar instance. The enabling act of Nebraska, April 16, 1864, after granting to the new state certain salt springs, contained the following provision, viz.: "That no salt spring or land, the right whereof is now vested in any individual or individuals, shall, by this act, be

granted to said state." Morton, in September, 1859, prior to the enabling act referred to, holding certain military bounty land warrants, issued under the act of 1850, which declared that such warrants might be located upon any of the public lands in that district then subject to private entry, located his warrants upon certain lands which, at the time of entry, he knew contained salines, and, having obtained a patent for them, contended that this location was ratified by the proviso above cited. But the Supreme Court, in passing on the question, said: "Whether this legislation was necessary to save salt springs claimed under the French treaty, it is not important to determine, but manifestly it had this purpose in view, and nothing more. It could not refer to salt springs not then claimed, because all entry upon them was unlawful, on account of previous reservation. This proviso can have little significance in the enabling act of Nebraska, nor, indeed, in many other enabling acts, but Congress thought proper to introduce it out of superabundance of caution." The patent in this case was held void, because issued upon lands reserved from sale.

I will cite but one more case, and it is one which seems to me conclusive upon the question raised by this demurrer. It is the case of *Steel* v. *Smelting Co.* 106 U. S. 447; S. C. 1 Sup. Ct. Rep. 389. Speaking of the frequent discovery of mineral deposits "within the limits of what may be termed the site of the settlement or new town," Justice Field, delivering the opinions of the court, says: "To such claims the miner acquires as good a right as though his discovery was in a wilderness, removed from all settlement, and he is equally entitled to patent for them." Again, referring in express terms to these very sections — 2386 and 2392—he says: "The acts of Congress relating to townsites recognize the possession of mining claims within their limits, and forbid the acquisitions of any mine of gold, silver, cinnabar or copper within them under proceedings by which title to other lands there situated is se-

cured; thus leaving the mineral deposits within townsites open to exploration, and the land in which they are found to occupation and purchase, in the same manner as such deposits are elsewhere explored and possessed, and the lands containing them are acquired. Whenever, therefore, mines are found in lands belonging to the United States, whether within or without townsites, they may be claimed and worked, provided existing rights of others from prior occupation are not interferred with. Whether there are rights thus interferred with which should preclude the location of the miner and the issue of a patent to him, is, when not subjected under the law of congress to the local tribunals, a matter properly cognizable by the land department, when application is made to it for a patent. And the inquiry thus presented must necessarily involve a consideration of the character of the land to which title is sought, whether it be mineral, for which a patent may issue, or agricultural, for which a patent should be withheld"

It is unnecessary to pursue this subject further. I have considered it somewhat at length because of the great importance of the issue, and also, because, so far as I am aware, this precise question has never come before any of our courts for adjudication. We think it clear that no title can be acquired under the provisions of the townsite law to lands known to be valuable for minerals, but that such lands are free and open for exploration, occupation and purchase for mining purposes. And, although the late Secretary of the Interior was manifestly correct in holding that the whole surface is necessary to the full enjoyment of the lands by either placer or townsite owners, yet that circumstance can hardly be considered as of such importance in the determination of this case, because the statute guarantees to the patentee of a mining claim the full and exclusive possession and enjoyment of the land, with all that it contains, and any exception or reservation in any such

patent, not expressly provided for in the statute, would be without authority of law and therefore void. It follows from these views that the defendants are in no position to assail plaintiff's title, since, if his patent were out of the way, they would not be entitled to one. We conclude that there was no error in the ruling of the department, or in the issuance of a patent to the plaintiff, by which the rights of the defendants were prejudiced, and that the judgment of the district court upon this branch of the answer, was therefore correct.

This brings me to the consideration of the demurrer to that portion of the answer which sets up as a counterclaim the claim of the defendants for the value of improvements erected by them upon the land. The principal allegations of the answer in this behalf, besides those already stated are: (1) that on the twenty-eighth of February, 1877, the day when, by the removal of the Indian reservation, the Black Hills country was open to legal settlement, one Henry B. Beaman, being one of the inhabitants of said townsite of Deadwood, was in the peaceful and lawful possession of the land in question, claiming to be the owner, and having improvements thereon; (2) that on the ——— of July, 1878, Beaman, being still in the lawful, quiet and peaceful possession of this land, and claiming title thereto, sold and conveyed it by good and sufficient deed to the defendent, who purchased the same in good faith, and for a valuable consideration, and has ever since occupied and possessed the same, holding under said deed, and claiming title thereto in good faith, adversely to plaintiff's; (3) that before plaintiff acquired title to the land, defendant, in good faith made certain permanent improvements on the premises, vis.: a two-story frame building and cellar and other improvements, of the value of $1,300; (4) that the value of the land aside from the improvements, does not exceed $100.

This claim was apparently based upon section 641 of the Territorial Code of Civil Procedure, which provides,

that "in an action for the recovery of real property upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a counter-claim by such defendant." The three following sections regulate the practice in such cases. Very little was said by appellant's counsel upon the argument on this branch of the case. His original brief makes no reference to it whatever, and his supplemental brief dismisses the matter in four lines. We are not, therefore, advised very fully as to his position upon this subject. By the organic act the legislature is expressly forbidden to pass any law interfering with the primary disposal of the soil, or any law impairing the rights of private property. Whether the territorial statute is obnoxious to the inhibition last mentioned, is a question which, though suggested upon the argument, we do not deem it necessary to determine; nor have we quoted these sections of the statute upon this subject, out of which the conflict is supposed more especially to arise. Similar questions have been mooted, and have met with various determinations by courts; but we think the case before us can be disposed of on other grounds.

As to whether any application of the statutes to these cases would bring it into conflict with the provisions of the organic act first mentioned, as being an interference with the primary disposal of the soil, may, perhaps, be thought to depend somewhat upon the further question, when did the legal title of the premises become vested in the plaintiff? Was it before or after the improvements were made? For it is manifest that, standing by itself, the territorial statute could have no operation or effect so long as these lands were the the property of the United States, and that the patent of the government would carry with it the full and unimcumbered title, free from every adverse claim, for it would be impossible for any one to

hold adversely or in good faith against the government, and hence, to acquire any right, legal or equitable, to compensation for improvements erected while the title was yet in the United States. *Steel* v. *Smelting Co.* 106 U. S. 456; S. C. 1 Sup. Ct. Rep. 389. It is supposed however, that the statute may derive some vitality from an act of Congress passed June 1, 1874 (Supp. Rev. St. 25), entitled "An act for the benefit of occupying claimants," which provides "that when an occupant of land, having color of title, in good faith, has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupancy shall be entitled in the federal courts to all the rights and remedies, and, upon instituting proper proceedings, such relief as may be given or secured to him by the statutes of the state or territory where the land lies, although the title of the plaintiff in the action may have been granted by the United States after said improvements were made." The last clause of this statute undoubtedly discloses its motive, and it is possible that the statute might have a very important bearing upon the inquiry as to what, in any case arising under it, would constitute color of title; but, whatever may be its scope or the extent of its application, we cannot suppose that it was designed to effect any alteration in the rules by which it is to be determined whether, in any given case, improvements have been made "in good faith;" and it is right here, we think, that the claim of the defendant fails. His claim is that after the purchase from Beaman of the premises, "and before the plaintiff acquired any title thereto, defendant in good faith made permanent improvements." It will be noticed that this averment is somewhat evasive in the statement which it professes to make of the relation between the time when the improvements were made and the time when plaintiff acquired title. Its value must be determined by a comparison with other admitted facts. Let us look at the dates of these transactions. Plaintiff's application for patent was filed November 20, 1877; his entry was made January 31, 1878;

defendant purchased of Beaman July 6, 1878; the townsite entry of the probate judge was made July 28, 1878; the hearing before the land office was ordered April 10, 1879; plaintiff's patent issued January 31, 1882.

Now, it is evident that plaintiff must have acquired title either by his entry, January 31, 1878, or by his patent, January 31, 1882. To which of these dates does the claim of the defendant refer? Obviously, not to the former, because defendant himself acquired no title until nearly six months after that. It must, therefore, refer to the latter, and by well-settled rules of pleading it may be considered, in favor of the plaintiff, that the alleged improvements were made just prior to the last-mentioned date, and therefore at or even after the time when by the contest in the land office, and the decisions rendered thereon, he had become fully apprised, not only of the nature and extent of plaintiff's claim, but of the inherent weakness of his own. Yet it can matter little at what date after his purchase these improvements were made by the defendant. The application of November 20, 1877, and the entry of January 31, 1878, were open and notorious acts, by which all the world was apprised of the claim of the plaintiff. More than this: taken in connection with the patent afterwards issued, they furnish conclusive evidence of such actual possession of the premises by the plaintiff, and the doing of such amount of work thereon, and the performance of such other acts, as the law required to enable him to acquire title. *Steele v. Smelting Co., supra.* When, therefore, the defendant purchased these premises from Beaman, he must be presumed to have had full knowledge of the plaintiff's claim, and it was impossible for him, with such knowledge, to proceed "in good faith" to erect valuable permanent improvements. A definition sometimes given of "good faith," and one sufficiently broad to cover this case, is, "without notice." The "betterment statutes," as they are often called, are derived from the doctrine of the civil law: speaking of which, in the important and in-

structive case of *Greene v. Biddle*, 8 Wheat., on page 79, Justice WASHINGTON, for the court, says: "The exemption of the occupant, by the law, from an account for profits, is strictly confined to the case of a *bona fide* possessor, who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person claiming a better right to it. Most unquestionably, this character cannot be maintained for a moment after the occupant has notice of an adverse claim, especialiy if that be followed up by a suit to recover the possession. After this he becomes a *mala fide* possessor, and holds at his peril, and is liable to restore all the mesne profits, together with the land." And in a very recent case, the court cites with apparent approval the observations of the supreme court of Mississippi in *Cole* v. *Johnson* 53 Miss. 94, in the course of which, after saying that "good faith" is used in contradistinction to "bad faith," that court proceeds: "Our view is that, in order to deprive the occupant of land under color of title of the value of permanent improvements erected thereon, there must be brought home to him either knowledge of an outstanding paramount title, or some circumstance from which the court or jury may fairly infer that he had cause to suspect the validity of his own title."

Canal Bank v. Hudson, 111 U. S., p. 81.

In cases where the courts have had occasion to define who were included in the designation "subsequent purchasers and incumbrancers in good faith," and similar phrases, the rule has been laid down with still greater strictness. Chancellor KENT thus states the rule in equity in this class of cases: "If a purchaser wishes to rest his claim on the fact of being an innocent *bona fide* purchaser, he must deny notice, even though it be not charged, and he must deny it positively and not evasively; he must even deny fully and in the most express terms every circumstance from which notice could be inferred." *Denning* v. *Smith*, 3 Johns. Ch. 345.

A further question is suggested as arising out of the circumstance that defendant's claim is not, and, by his own showing, was not, before the land office a claim of full title to the premises in controversy, but only that the patent to plaintiff should contain an exception or reservation of the town property rights, and all houses, buildings, lots, blocks, streets, alleys, and other improvements, and that he now concedes the right of the plaintiff to mine and extract the precious metals, so far as this can be done without endangering the surface improvements. It may well be doubted whether such a claim could be said to possess that adverse character contemplated by the statute, since, as we have already observed, there is no law under which the surface proprietorship could be conveyed to one and the minerals to another; but the principles already enunciated in respect to the essential element of "good faith" must control the disposition of the cases. Uupon this branch of the case, as upon the other, we think the judgment of the district court was correct, and it is therefore affirmed.

HUDSON, J., concurs. EDGERTON, C. J., dissents. PALMER, J., not having been a member of the court at the time of the argument, did not vote.